

Was Machiavelli Right? Lying in Negotiation and the Art of Defensive Self-Help

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"Truth is such a precious quantity, it should be used sparingly."

Mark Twain

I. INTRODUCTION

Niccoló Machiavelli,¹ who enthusiastically endorsed the art of deception, wrote in *The Prince* nearly five hundred years ago, "[Y]ou must be a great liar . . . a deceitful man will always find plenty who are ready to be deceived."² Was Machiavelli right? Can honing one's ability to lie be advantageous in certain situations? Moreover, are there great liars among us who are willing and able to prey upon the so-called "sucker born every minute"?³ Finally, if such liars exist, to what extent has the rest of society

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¹ Niccoló Machiavelli (1469–1527) was an Italian diplomat, political philosopher, musician, poet, and playwright. A figure of the Italian Renaissance, Machiavelli is perhaps best known for his treatise on realist political theory. See NICCOLÓ MACHIAVELLI, *THE PRINCE* (Robert M. Adams trans., W.W. Norton & Company, Inc. 1977) (1532); see also *STUDIES IN MACHIAVELLIANISM* (Richard Christie & Florence L. Geis eds., Academic Press Inc. 1970) (discussing studies indicating that people who demonstrate strength in a personality variable called "Machiavellianism" are more likely to lie when they need to do so, better able to tell lies without feeling anxious, and more persuasive and effective in their lies).

² MACHIAVELLI, *supra* note 1, at 50.

³ Although the well-known phrase is often attributed to American showman P.T. Barnum, at least one source attributes it to the famous confidence man Joseph "Paper Collar Joe" Bessimer. See A. H. SAXON, *P.T. BARNUM: THE LEGEND AND THE MAN* 336–37 (2d ed. 1989). For an excellent discussion of Machiavelli, Hobbes, Locke, Montesquieu, Rousseau, and others placed into context within the Modern Age of

been trained in the art of defensive self-help, or the mindsets, strategies, and tactics necessary to protect themselves from exploitation?

I wrote this article to advance a dialogue and debate surrounding a new way to address the thorny and seemingly intractable problem of lying in the context of negotiation.⁴ Specifically, although a good deal of ink has been spilled in past law review articles focusing on the offending parties (the liars and deceivers) and how various rules and laws might be altered to control their behavior,⁵ in this article I turn the spotlight on the defending parties (those being lied to and deceived) and ways they can shield themselves from such predatory behaviors.

The majority of law review articles written regarding ethical issues surrounding lying and deception in negotiation have argued, in one form or another, that liars and deceivers could be successfully reined in and controlled if only the applicable ethics rules were strengthened, and if corresponding enforcement mechanisms and powers were sufficiently beefed-up and effectively executed. This article, however, argues that the applicable ethics rules will likely never be strengthened, and, furthermore, that even if they were, they would be difficult to enforce in any meaningful way, at least in the context of negotiation.

The logical conclusion to these arguments is that lawyers, business people, and everyone else who engages in negotiation must learn how to carefully and purposefully implement strategies and behaviors to defend themselves against those who lie and deceive—no matter the reasons prompting it. I therefore conclude the article by offering prescriptive advice (including examples) for minimizing one's risk of being exploited in a

Western political philosophy, see BAILEY KUKLIN & JEFFREY W. STEMPEL, FOUNDATIONS OF THE LAW: AN INTERDISCIPLINARY AND JURISPRUDENTIAL PRIMER 47–72 (1994).

⁴ Polanyi wrote:

In an ideal free society each person would have perfect access to the truth: to the truth in science, in art, religion and justice, both in public and private life. But this is not practicable; each person can know directly very little of truth and must trust others for the rest. Indeed, to assure this process of mutual reliance is one of the main functions of society.

MICHAEL POLANYI, THE STUDY OF MAN 68 (1958).

⁵ See, e.g., Walter W. Steele, Jr., *Deceptive Negotiating and High-Toned Morality*, 39 VAND. L. REV. 1387 (1986); Alvin B. Rubin, *A Causerie on Lawyers' Ethics in Negotiation*, 35 LA. L. REV. 577 (1975); Robert C. Bordone, *Fitting the Ethics to the Forum: A Proposal for Process-Enabling Ethical Codes*, 21 OHIO ST. J. ON DISP. RESOL. 1 (2005); Ruth Fleet Thurman, *Chipping Away at Lawyer Veracity: The ABA's Turn Toward Situation Ethics in Negotiations*, 1990 J. DISP. RESOL. 103 (1990); Geoffrey M. Peters, *The Use of Lies in Negotiation*, 48 OHIO ST. L.J. 1 (1987) [hereinafter Peters, *Use of Lies*].

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negotiation should other parties lie. The advice is undergirded by the notion, expressed throughout the article, that information exchange (or lack thereof) plays a pivotal role in all negotiations. Indeed, I argue that information is the lifeblood of any negotiation, and therefore that the various strategies and behaviors influencing whether, when, and how information is obtained and/or exchanged are extremely important in the process of defending oneself (or one's client) against lying and deception.

The article is divided into six Parts. In Part II, I discuss the role that negotiation plays, and that lying plays, in law and in wider contexts. I also describe the kinds of issues people tend to lie about when they negotiate. Part III analyzes incentives people have to lie in certain kinds of negotiations, as well as possible antidotes to lying within specific hypothetical scenarios. Part IV analyzes the law of truthfulness, from duties of disclosure, to requirements of "good faith" that are just starting to gain a foothold in the context of negotiation, to the long-accepted practice of "puffing." Part V reports the outcome of a survey illustrating the disagreement and confusion that appears to exist among lawyers regarding standards of truthfulness in the law. Part VI analyzes why raising the ethical bar, or why strengthening the duty of candor as currently set forth in rules of professional conduct for lawyers, would likely fail. Part VII offers prescriptive advice for minimizing the risk of exploitation during negotiation by setting forth mindsets, strategies, and techniques that both lawyers and nonlawyers can draw upon when confronting liars and deceivers. Although this article is targeted to legal academics, practicing lawyers, and the wider legal community, the suggestions I offer are equally applicable to negotiations taking place in almost any field, occupation, or circumstance.

II. LYING IN NEGOTIATION: BUILDING A CONTEXT

A. *The Normalcy of Lying*

People lie. As one scholar of deception notes, "Lying is not exceptional; it is normal, and more often spontaneous and unconscious than cynical and coldly analytical. Our minds and bodies secrete deceit."⁶ Moreover, lawyers

⁶ DAVID LIVINGSTONE SMITH, *WHY WE LIE: THE EVOLUTIONARY ROOTS OF DECEPTION AND THE UNCONSCIOUS MIND* 15 (2004); *see also* SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* xvii (1978) [hereinafter BOK, *LYING*] (suggesting that "[i]n law and in journalism, in government and in the social sciences, deception is taken for granted when it is felt to be excusable by those who tell the lies and who tend also to make the rules.").

lie,⁷ especially in negotiations.⁸ One legal scholar concludes that lying is “not the province of a few ‘unethical lawyers’ who operate on the margins of the profession. It is a permanent feature of advocacy and thus of almost the entire province of law.”⁹ And business people lie: one business ethics scholar concludes simply, “Commercial negotiations seem to require a talent for deception.”¹⁰ This statement is easy to believe in light of corporate scandals

⁷ Negotiations Professor Charles Craver is fond of starting negotiation workshops with the candid statement: “I’ve never been involved in legal negotiations where both sides didn’t lie.” DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 470 (5th ed. 2004); *see also* Carrie Menkel-Meadow, *Ethics, Morality and Professional Responsibility in Negotiation*, in *DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE* 119, 126 (Phyllis Bernard & Bryant Garth eds., 2002) [hereinafter Menkel-Meadow, *Ethics, Morality*] (pointing out that many professions exhibit “role-based exceptions” to the general commandment against lying and deception, for example, “doctors deceive or lie to protect their clients’ health or confidentiality; journalists, police officers and social scientists use deception to learn the ‘truth’ and protect their sources; and public officials lie to protect national security, as well as to get elected by large, diverse and contentious constituencies.”).

⁸ Affirmative misrepresentations by lawyers in negotiation have been the basis for: (1) litigation sanctions (*see, e.g.,* Sheppard v. River Valley Fitness One, L.P., 428 F.3d 1, 11 (1st Cir. 2005)); (2) setting aside settlement agreements (*see, e.g.,* Virzi v. Grand Trunk Warehouse & Cold Storage Co., 571 F. Supp. 507, 512 (E.D. Mich. 1983) (setting aside settlement agreement because lawyer failed to disclose death of client prior to settlement)); and (3) civil lawsuits against lawyers themselves (*see, e.g.,* Jeska v. Mulhall, 693 P.2d 1335, 1338–39 (Or. Ct. App. 1985) (sustaining fraudulent misrepresentation claim by buyer of real estate against seller’s lawyer for misrepresentations made during negotiations)).

⁹ Gerald B. Wetlaufer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219, 1272 (1990). Moreover, lying is not limited to the province of “advocacy” within law—it also occurs in more cooperative realms, like mediation. Professional mediator Robert Benjamin defines “noble lies” as those told by mediators that are “designed to shift and reconfigure the thinking of disputing parties, especially in the midst of conflict and confusion, and to foster and further their cooperation, tolerance, and survival . . .” Robert D. Benjamin, *The Constructive Uses of Deception: Skills, Strategies, and Techniques of the Folkloric Trickster Figure and Their Application by Mediators*, 13 MEDIATION Q. 3, 17 (1995); *see also* Donald C. Langevoort, *Half-Truths: Protecting Mistaken Inferences By Investors and Others*, 52 STAN. L. REV. 87, 89 (1999) (“Instructions to tell the ‘whole truth’ notwithstanding, it is generally not considered perjury in a trial or deposition for a witness to give a technically true but evasive answer.”).

¹⁰ G. Richard Shell, *When Is It Legal to Lie in Negotiations?*, 32 SLOAN MGT. REV. 93, 93 (1991); *see also* William H. Widen, *Lord of the Liens: Towards Greater Efficiency in Secured Syndicated Lending*, 25 CARDOZO L. REV. 1577, 1600 n.76 (arguing that lying in business is “widespread” in American society). Others have made similar observations:

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such as Enron,¹¹ Tyco, WorldCom, Global Crossing, Qwest, Adelphia Communications, and, more recently, the arrest of two former Bear Stearns executives for fraud¹² as well as the arrest of over four hundred (and counting) real estate professionals in a nationwide Justice Department investigation dubbed “Operation Malicious Mortgage.”¹³

Nearly twenty years ago, one legal scholar noted that, “Thus far, efforts to improve bargaining ethics have been an empty vessel.”¹⁴ Despite prolific and insightful scholarship on the subject,¹⁵ the same statement could be made

Most executives from time to time are almost compelled, in the interests of their companies or themselves, to practice some form of deception when negotiating with customers, dealers, labor unions, government officials, or even other departments of their companies. By conscious misstatements, concealment of pertinent facts, or exaggeration—in short, by bluffing—they seek to persuade others to agree with them.

Albert Carr, *Is Business Bluffing Ethical?*, in *ETHICAL ISSUES IN BUSINESS: A PHILOSOPHICAL APPROACH* 69, 70–71 (Thomas Donaldson & Patricia H. Werhane eds., 3d ed. 1988).

¹¹ See Nancy B. Rapoport, *Enron, Titanic, and The Perfect Storm*, 71 *FORDHAM L. REV.* 1373, 1394–95 (2003) (“[T]he collapse [of Enron] was caused by humans and their hubris. We need to ensure that hubris doesn’t blind us to the first rule of leadership: It’s all about character.”); Robert W. Hamilton, *The Crisis in Corporate Governance: 2002 Style*, 40 *HOUS. L. REV.* 1 (2003) (discussing the governance failures of a number of companies, including Tyco, Global Crossing, and Qwest); Jeffrey N. Gordon, *What Enron Means for the Management and Control of the Modern Business Corporation: Some Initial Reflections*, 69 *U. CHI. L. REV.* 1233 (2002) (discussing future implications of Enron).

¹² The two men, Ralph R. Cioffi and Matthew M. Tannin, were the first senior executives from Wall Street investment banks to face criminal charges stemming from the U.S. economy’s still-unfolding credit difficulties. Charging the men with nine counts of securities, mail, and wire fraud, Mark J. Mershon, director of the FBI’s New York Office, stated at a press conference: “This is not about mismanagement of a hedge fund investment strategy . . . *It is about premeditated lies to investors and lenders.*” Landon Thomas, Jr., *2 Face Fraud Charges in Bear Stearns Debacle*, *N.Y. TIMES*, June 20, 2008, at A1 (emphasis added).

¹³ Beginning in March, 2008, the Justice Department has charged 406 people nationwide with mortgage fraud. Sam Zuckerman, *Mortgage Mess Leads to Arrests; 2 Wall Street Execs Indicted and Cuffed—Federal Fraud Sweep Tops 400 Defendants*, *S.F. CHRON.*, June 20, 2008, at A1.

¹⁴ Eleanor Holmes Norton, *Bargaining and the Ethic of Process*, 64 *N.Y.U. L. REV.* 493, 577 (1989).

¹⁵ See, e.g., *WHAT’S FAIR: ETHICS FOR NEGOTIATORS* (Carrie Menkel-Meadow & Michael Wheeler eds., 2004); Scott R. Peppet, *Lawyers’ Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism*, 90 *IOWA L. REV.* 475 (2005) [hereinafter Peppet, *Bargaining Ethics*];

today. And though efforts will likely be made to improve bargaining ethics during the next twenty years, this article puts forth recommendations for action—specifically, the use of defensive mindsets, strategies, and tactics—that can be implemented starting today, by lawyers, business people, and anyone else who might be confronted with lies and deception in the context of negotiation.¹⁶

During the last two decades, there have been numerous calls from legal academia to strengthen the ethics rules governing bargaining for lawyers, yet little to none have prevailed.¹⁷ Professor Scott Peppet states, “The minimalist way in which we currently regulate bargaining is one of the most powerful expressions of the profession’s conception of the lawyer as adversarial

CHARLES B. CRAVER, *EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT* (5th ed. 2005); ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTE* (2000); *DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE*, *supra* note 7; ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (2d ed. Penguin Books 1991) (1981); Jonathan R. Cohen, *When People are the Means: Negotiating with Respect*, 14 GEO. J. LEGAL ETHICS 739 (2001); Douglas H. Yarn, *Lawyer Ethics in ADR and the Recommendations of Ethics 2000 to Revise the Model Rules of Professional Conduct: Considerations for Adoption and State Application*, 54 ARK. L. REV. 207 (2001); Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers’ Responsibilities*, 38 S. TEX. L. REV. 407 (1997); Kimberlee K. Kovach, *New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation*, 28 FORDHAM URB. L.J. 935 (2001); Christopher M. Fairman, *Ethics and Collaborative Lawyering: Why Put Old Hats on New Heads?*, 18 OHIO ST. J. ON DISP. RESOL. 505 (2003).

¹⁶ Some scholars have drawn a distinction between negotiations involving the resolution of legal disputes and negotiations in the context of business transactions. *See, e.g.*, Hilary D. Wells, *Raising the Bar in Settlement Negotiations: A Rationale for Amending Arizona’s Rules of Professional Conduct*, 33 ARIZ. ST. L.J. 1261, 1268 (2001) (“Arguably, when trial is the ultimate forum for resolving a failed negotiation, practices acceptable in settlement negotiations should more closely emulate courtroom practices than business conventions.”). Other scholars suggest the distinction is not particularly meaningful: “Although negotiations may be categorized as aimed at either settling legal disputes or trying to consummate deals, these two categories of negotiations would collapse into a single type were it not for the availability of a court to which parties could resort upon failure of negotiations concerning a legal dispute.” Geoffrey C. Hazard, Jr., *The Lawyer’s Obligation to be Trustworthy When Dealing With Opposing Parties*, 33 S.C. L. REV. 181, 188 (1981).

¹⁷ *See* Wells, *supra* note 16, at 1276–77 (in discussing the unanswered call to the bar for definitive guidance regarding lawyer conduct in negotiations, the author concludes that, despite revisions put forth by two separate ABA ethics reform committees, truth-telling requirements in negotiation “will remain hopelessly ineffective unless substantive revisions are undertaken.”).

advocate. To reform bargaining ethics is to end the profession as we know it.”¹⁸ However, I would suggest that Professor Peppet’s statement gives too much credence to the power of rules and laws in shaping behavior with respect to lying in negotiation. After all, such rules and guidelines can influence people’s behavior only to the extent that they feel they might realistically get caught and ultimately pay a price through the court and penal systems or through a professional disciplinary body. Moreover, there are other potentially powerful factors influencing lying in negotiation, such as one’s internal morality (including the “mirror” test, or “how do I appear to myself at the end of the day?”)¹⁹ and one’s reputational interests.²⁰

¹⁸ Peppet, *Bargaining Ethics*, *supra* note 15, at 480; see also Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 909 (1999) (“[T]he formal [ethics] rules represent nothing more than ‘the lowest common denominator of conduct that a highly self-interested group will tolerate.’” (quoting Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 730 (1994)). Also:

‘Thinking like a lawyer’ does not refer to lawyers pondering how they can assure that their clients obey the law. Rather, it generally means that lawyers strategize how they can accomplish their clients’ objectives to the greatest extent possible without running afoul of the law. This approach to advocacy is embodied in the ethical rules and legal culture in the U.S.

Christopher M. Fairman, *Why We Still Need a Model Rule for Collaborative Law: A Reply to Professor Lande*, 22 OHIO ST. J. ON DISP. RESOL. 707, 709 (2007) (quoting John Lande, *Principles for Policymaking About Collaborative Law and Other ADR Processes*, 22 OHIO ST. J. ON DISP. RESOL. 642, 646 (2007)).

¹⁹ Carrie Menkel-Meadow, *What’s Fair in Negotiation? What is Ethics in Negotiation?*, in WHAT’S FAIR: ETHICS FOR NEGOTIATORS, *supra* note 15, at xv.

²⁰ See Menkel-Meadow, *Ethics, Morality*, *supra* note 7, at 123 (pointing out that lawyers must be wary of reputational implications because what they say is now witnessed by growing numbers of participants in various ADR processes, including the third-party neutrals like mediators and arbitrators, as well as judges, opponents, and other parties); Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 525–27, 561–64 (1994) (recommending that professional groups catering to lawyers create mechanisms to facilitate the building and dissemination of attorney reputations); Peter C. Cramton & J. Gregory Dees, *Promoting Honesty in Negotiation: An Exercise in Practical Ethics*, in WHAT’S FAIR: ETHICS FOR NEGOTIATORS, *supra* note 15, at 119 (discussing how a “negotiator with a reputation for being deceitful is likely to be disadvantaged in future negotiations.”); Holmes Norton, *supra* note 14, at 501 (arguing that a “functionalist” approach to bargaining can produce minimal truthfulness standards); ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 350 (Liberty Classics 1976) (1759) (“The prudent man is always sincere, and feels horror at the very thought of exposing himself to the disgrace which attends upon the detection of falsehood.”).

In writing this article, I wish to make readers question whether strengthening current bargaining ethics rules is a worthwhile goal to pursue. Indeed, I write the article with the intention of making readers conclude that there is a certain necessity, perhaps even genius, to the “minimalist way” in which bargaining is currently regulated within the legal profession.

B. *The Centrality of Negotiation*

The scope of disputes subject to resolution by negotiation is “almost galactic.”²¹ From negotiating as part of litigation,²² to negotiating outside the courtroom on matters such as adoptions, mergers, wills, contracts, incorporations, and divorces, negotiation is a fundamental task within all aspects of the legal profession, both civil²³ and criminal (through negotiated plea bargains).²⁴

One scholar suggests that:

We lawyers are generally counted as successful in the degree to which we are effective at producing instrumental results through our strategic speaking. Much of our speaking, perhaps even most, takes place in the

²¹ James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RES. J. 926, 927 (1980) (discussing negotiation as a “process by which one deals with the opposing side in war, with terrorists, with labor or management in a labor agreement, with buyers and sellers of good, services, and real estate, with lessors, with governmental agencies, and with one’s clients, acquaintances, and family.”).

²² See Marc Galanter, “. . . A Settlement Judge, Not a Trial Judge:” *Judicial Mediation in the United States*, 12 J.L. & SOC’Y 1 (1985) (Negotiation “is not some unusual alternative to litigation. It is only a slight exaggeration to say that it *is* litigation. There are not two distinct processes, negotiation and litigation; there is a single process of disputing in the vicinity of official tribunals that might fancifully be called LITIGATION.” (emphasis in original)).

²³ Charles B. Craver writes:

[T]wo professional practitioners who are intimately familiar with the fundamental interests of their respective clients can usually formulate a more efficient resolution of the underlying client problem than can an external decision-maker who will rarely possess the same degree of knowledge or understanding. This would explain why over 95 percent of law suits are resolved without adjudications.

Craver, *supra* note 15, at 2

²⁴ See Rebecca Hollander-Blumoff, *Social Psychology, Information Processing, and Plea Bargaining*, 91 MARQ. L. REV. 163, 163 n.1 (2007) (“Plea bargaining accounts for the vast majority of outcomes of criminal cases, and, despite its critics, the process shows no sign of decreasing in importance.”).

arenas of negotiation. That is where we reach almost all of our agreements and settle almost all of our differences.²⁵

The late Harvard Law School Dean Erwin Griswold suggested that lawyers are constantly negotiating: “they are constantly endeavoring to come to agreements of one sort or another with people, to persuade people, sometimes when they are very reluctant to be persuaded.”²⁶

C. *Lying in Negotiation: Definitions and Parameters*

Lying is difficult to define. As Montaigne said, “If falsehood, like truth, had but one face, we should know better where we are, for we should then take for certain the opposite of what the liar tells us. But the reverse of the truth has a thousand shapes and a boundless field.”²⁷ Writing in the context of negotiation, one scholar attempts to subdue and organize this “boundless field” by creating two categories (“lies” and “deception”) into which any manner of untruth will fall. For this article, I will adopt the following working definitions of these two categories: A “lie” is “a false statement made by one who knows its falsity and with the intent to deceive another as

²⁵ Wetlaufer, *supra* note 9, at 1220. Other commentators have made suggestions that, within the field of ADR, negotiation is the “horse” while third-party ADR is the “cart,” and wondered:

[I]f the ADR movement has created new hurdles on the road to dispute resolution even while the negotiation movement has been providing lawyers and disputants with good advice useful in resolving disputes with less cost, delay, and acrimony. To avoid this potential negative result, the legal profession—particularly the judiciary—might better serve society by trumpeting negotiation more and pushing third-party ADR processes or events less.

Jeffrey W. Stempel, *Forgetfulness, Fuzziness, Functionality, Fairness, and Freedom in Dispute Resolution: Serving Dispute Resolution Through Adjudication*, 3 NEV. L.J. 305, 344, 347 (2002/2003).

²⁶ Erwin N. Griswold, *Law Schools and Human Relations*, 1955 WASH. U. L.Q. 217, 223 (1955); see also Derek C. Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570, 582–83 (1983) (Twenty-five years ago, then Harvard President (and former Harvard Law School Dean) Derek Bok warned that law students were being trained “more for conflict than for the gentler arts of reconciliation and accommodation.”).

²⁷ MICHEL DE MONTAIGNE, *THE ESSAYS OF MONTAIGNE: VOL. 1*, at 30–31 (E.J. Trechmann trans., 1927) (1580); see also John W. Cooley, *Mediation Magic: Its Use and Abuse*, 29 LOY. U. CHI. L.J. 1, 10 (1997) (“[I]n day-to-day professional and personal lives, people deal with numerous shades of truth, never knowing exactly what truth really is.”).

to the truth.”²⁸ A “deception” is “any other method of concealing the truth, including silence.”²⁹ That is, deception has taken place if one party, without making a false statement, nonetheless manages to create or preserve an impression in another where that impression is (1) false, (2) known to be so, and (3) intended to conceal the truth.³⁰

Interestingly, Roger Fisher, William Ury, and Bruce Patton employ various terms and phrases (“deliberate deception,” “misrepresentation,” “dirty trick,” “trickery,” and “false statement”) where one might be tempted to use the word “lie” or “lying.” Consider, for example, the text appearing immediately after the heading “Deliberate deception”:

Perhaps the most common form of dirty trick is misrepresentation about facts, authority, or intentions . . . The oldest form of negotiating trickery is to make some knowingly false statement: “This car was driven only 5,000 miles by a little old lady from Pasadena who never went over 35 miles per hour.”³¹

And might the “posturing,” “self-serving stances,” and “strategic misrepresentations,” as discussed below by Professor Howard Raiffa, be considered by some to be, simply, lies? Professor Raiffa states:

A common ploy is to exaggerate the importance of what one is giving up and to minimize the importance of what one gets in return. Such posturing is part of the game. In most cultures these self-serving negotiation stances are expected, *as long as they are kept in decent bounds*. Most people would not call this “lying,” just as they would choose not to label as “lying” the exaggerations that are made in the adversarial confrontations of a courtroom. I call such exaggerations “strategic misrepresentations.”³²

Is it fair for Professor Raiffa to say that “most people” would not label these as lying? And at what point do these “strategic misrepresentations” transgress the so-called “decent bounds” to which Professor Raiffa refers? Is it only then that they become lies?

²⁸ Peters, *Use of Lies*, *supra* note 5, at 11.

²⁹ *Id.*

³⁰ See *id.* To what extent is this a distinction without a difference? Sissela Bok notes that “[i]t is perfectly possible to define ‘lie’ so that it is identical with ‘deception.’ This is how expressions like ‘living a lie’ can be interpreted.” BOK, LYING, *supra* note 6, at 14.

³¹ FISHER, URY & PATTON, *supra* note 15, at 132.

³² HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION: HOW TO RESOLVE CONFLICTS AND GET THE BEST OUT OF BARGAINING 142 (16th ed. 2002) (emphasis added).

Although one legal scholar concludes that “[t]he problem of lying in negotiations is central to the profession of law,”³³ it is difficult to measure the frequency with which lies are being told (or their level of seriousness) because most negotiations take place in private settings.³⁴ In one survey on lying, the average of estimates from attorney respondents was that lying about material facts occurred in 23% of the non-mediated negotiations in which the respondents participated.³⁵ Another survey of a national sample of lawyers found that 51% believed that “unfair and inadequate disclosure of material information” during pre-trial negotiation was a “regular or frequent problem.”³⁶

The bottom line is that however it is labeled, and whatever the level of seriousness, lying and deception occur in negotiation. In this article, I will focus on *conscious, strategic* lies that are often motivated by rational economic incentives inherent in certain kinds of negotiations, and that result

³³ Wetlaufer, *supra* note 9, at 1220. Professor Wetlaufer states further: “If it is true that lawyers succeed in the degree to which they are effective in negotiations, it is equally true that one’s effectiveness in negotiations depends in part upon one’s willingness to lie.” *Id.*

³⁴ Such private settings do not provide the safeguards available in a court of law, including (1) elaborate procedural rules; (2) an impartial judge to apply existing law, enforce limits, and rule on alleged abuses; and (3) an impartial trier of fact to decide contested issues. GEOFFREY C. HAZARD, JR., SUSAN P. KONIAK, ROGER C. CRAMTON & GEORGE M. COHEN, *THE LAW AND ETHICS OF LAWYERING* 737 (4th Ed. 2005); *see* White, *supra* note 21, at 926 (contending that ethical norms can be violated with greater confidence in negotiation than in other contexts because there will likely be neither discovery nor punishment).

³⁵ Don Peters, *When Lawyers Move Their Lips: Attorney Truthfulness in Mediation and a Modest Proposal*, 2007 J. DISP. RESOL. 119, 123 (2007) [hereinafter Peters, *Attorney Truthfulness*]. The survey, on file with Professor Peters at the University of Florida Levin College of Law, defined material facts as “event, subject, and other specifics affecting deals or dispute resolutions that fraud law would consider actionable as going beyond puffing or acceptable exaggeration.” *Id.* at 123 n.28. When the general public is polled on their perception of lawyers, the response is troubling: according to an ABA poll, only one in five Americans considers lawyers to be “honest and ethical” and, furthermore, “the more a person knows about the legal profession and the more he or she is in direct personal contact with lawyers, the lower [his or her] opinion of them.” Gary A. Hengstler, *Vox Populi: The Public Perception of Lawyers: ABA Poll*, 79 A.B.A. J. 60, 62 (1993).

³⁶ Peters, *Attorney Truthfulness*, *supra* note 35, at 123 (citing Steven D. Pepe, Standards of Legal Negotiations: Interim Report and Preliminary Findings (1983) (unpublished manuscript, on file with New York University Law Review)); *see also* Peters, *Use of Lies*, *supra* note 5, at 3 (“It is against the rules for lawyers to lie, but their ability to deceive through other means is at least accepted and frequently applauded.”).

from a strong desire to “win” by closing the deal with terms that are highly favorable to oneself or one’s client.

The issues about which people lie and deceive during negotiations are many and varied. To name but a few, people lie about the following: (1) the current or future value (including long-term performance claims) of whatever is being discussed in the negotiation (whether it be goods, services, or something else); (2) one’s goals, priorities, or interests³⁷ in the negotiation;³⁸ (3) one’s reservation point;³⁹ (4) one’s best alternative option if a deal is not agreed upon;⁴⁰ (5) one’s willingness, ability, or authority to negotiate or to reduce the deal terms to contract form; (6) the existence of objective standards⁴¹ and how they might inform the negotiation; (7) one’s own

³⁷ For example, “My client insists he wants custody of the children, although I might be able to talk him out of it if you let him have the house.”

³⁸ On the concept of lying about goals in negotiation:

It is a standard negotiating technique in collective bargaining negotiation and in some other multiple-issue negotiations for one side to include a series of demands about which it cares little or not at all. The purpose of including these demands is to increase one’s supply of negotiating currency. One hopes to convince the other party that one or more of these false demands is important and thus successfully to trade it for some significant concession.

See White, *supra* note 21, at 932;

Alert negotiators occasionally discover . . . that their opponents really desire an item that is not valued by their own client. When this knowledge is obtained, many bargainers endeavor to take advantage of the situation. They try to avoid providing the other side with this topic in exchange for an insignificant term. They instead hope to extract a more substantial concession. To accomplish this objective, they mention how important that subject is to their client and include it with their initial demands. If they can convince their opponents that this issue is of major value to their side, they may be able to enhance their client’s position with what is actually a meaningless concession on their part.

CRAVER, *supra* note 15, at 284.

³⁹ In a negotiation, the reservation point is one’s “bottom line,” or the maximum amount that a buyer will pay for a good, service, or other legal entitlement. See Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L.J. 1789, 1791–94 (2000).

⁴⁰ This is also called one’s Best Alternative to a Negotiated Agreement (or “BATNA”). FISHER, URY & PATTON, *supra* note 15, at 100 (defining BATNA as “the standard against which any proposed agreement should be measured. That is the only standard which can protect you both from accepting terms that are too unfavorable and from rejecting terms it would be in your interest to accept.”).

⁴¹ Objective standards are outside, independent, third party experts or information sources that can help determine the value or worth of a deal component within a

opinions or the opinions of clients, outside experts, or others; (8) the existence of other offers or competing bidders; (9) one's willingness or ability to go to trial; (10) promises (including commitments to future actions)⁴² or threats made during the negotiation to entice (or coerce) the other party into agreement; and (11) the substantive strengths of one's lawsuit, or weaknesses of the other side's lawsuit.⁴³

A major difficulty, of course, is that although some lies (such as the existence of competing bidders or the substantive strength of a given lawsuit) can usually be proven false by consulting with independent sources and experts, many lies (such as a person's priorities, underlying interests, or reservation point) simply cannot be detected, unless one is good at mindreading.

III. INCENTIVES TO LIE IN NEGOTIATIONS: SOMETIMES CHEATERS DO PROSPER

Essentially, negotiation involves dividing a pie. The pie might be "fixed" in size, it might be shrinking, or it might be expanding in size (a process sometimes referred to as "value creation")—yet whatever the case may be, the pie must be ultimately divided,⁴⁴ hopefully producing a satisfactory outcome for all parties.⁴⁵ While some consider negotiation to be merely a

negotiation in a more objective fashion. For example, the objective standard used in valuing a used car might be the Kelley Blue Book.

⁴² For example, "This stock will be worth \$10,000 in a year from now."

⁴³ White, *supra* note 21, at 934 ("Everyone expects a lawyer to distort the value of his own case, of his own facts and arguments, and to deprecate those of his opponent.").

⁴⁴ See Robert J. Condlin, *Bargaining with a Hugger: The Weaknesses and Limitations of a Communitarian Conception of Legal Dispute Bargaining, or Why We Can't All Just Get Along*, 9 CARDOZO J. CONFLICT RESOL. 1, 90 (2007) ("All bargaining . . . is a lying game to some extent, and one in which adversarial behavior plays an inevitable role.").

⁴⁵ One negotiation scholar defines a satisfactory negotiation outcome as:

[O]ne in which [the agreement reached]: (a) Is better than [one's] best alternative to a negotiated agreement (BATNA); (b) Meets [one's] interests very well, the interests of the other side acceptably, and the interests of any third parties who may be affected by the agreement at least tolerably enough to be durable; (c) Is the most efficient and value-creating of many possible sets of deal terms; (d) Is based on a norm of fairness or some objective standard, criterion, or principle that is external to the parties themselves; (e) Identifies commitments that are specific, realistic, and operational for both sides; (f) Is premised on clear and efficient communications; and (g) Improves or at least does not harm the relationship between the parties where "relationship" is defined as the ability of the parties to manage their differences well."

“dance of concessions and a battle of wills,”⁴⁶ negotiation scholars and those they teach, come to realize that the value of negotiation from a process perspective is the “potential to use creativity and mutual information exchange to produce deals that actually enlarge the size of the pie for the parties.”⁴⁷ To be a truly fine negotiator, then, one must be skilled in both enlarging the negotiation pie (when such value creation is possible), and in claiming (at least) a fair portion of that pie.⁴⁸

A. The Dynamics of “Zero-Sum” v. “Non-Zero-Sum” Negotiations

There are times when, no matter how creative the parties involved might be, the negotiation pie is a “fixed pie,” meaning it cannot be enlarged.⁴⁹ Such a situation presents a classic “zero-sum” negotiation,⁵⁰ sometimes called a “distributive” negotiation. A good example is the negotiation involved in dividing \$10 between two parties, both of whom equally value money, and both of whom need the money immediately.⁵¹ Every dollar one party

Bordone, *supra* note 5, at 16–17.

⁴⁶ *Id.* at 17.

⁴⁷ *Id.*

⁴⁸ See generally WHAT'S FAIR: ETHICS FOR NEGOTIATORS, *supra* note 15.

⁴⁹ See Robert H. Mnookin, *Strategic Barriers to Dispute Resolution: A Comparison of Bilateral and Multilateral Negotiations*, 8 HARV. NEGOT. L. REV. 1, 12 (2003) (discussing the “‘integrative’ possibilities present in some negotiations.” (emphasis added)); see also Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 809 (1984) (stating that one aspect of problem-solving negotiation “seeks wherever possible to convert zero-sum games into non-zero-sum or positive-sum games.” (emphasis added)).

⁵⁰ In game theory, a “zero-sum” situation is one in which every point (or dollar, cookie, etc.) gained by one party is a point lost by the other party, and vice versa, i.e., one party's gains are the other party's losses. See ROGER B. MYERSON, *GAME THEORY: ANALYSIS OF CONFLICT* (1997). For a discussion of negotiation as a zero-sum game, see Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982).

⁵¹ Robert Mnookin, Scott Peppet, and Andrew Tulumello point out that value is more likely created, and deals are more likely agreed upon, when there are differences in (1) resources (“A vegetarian with a chicken and a carnivore with a large vegetable garden may find it useful to swap what they have.”); (2) relative valuation (“[I]f the two parties attach different relative valuations to the goods in question, trades should occur that make both better off.”); (3) forecasts (“A singer who expects to draw a standing-room-only crowd might agree to a guaranteed fee based on 80 percent attendance, plus a percentage of any profits earned from higher attendance.”); (4) risk preferences (“[K]nowing that my family will face financial hardship if I die [might convince me to] . . . pay the insurance company to absorb that risk.”); and (5) time preferences (“Although a standard [apartment] lease would begin on the first of the month, Jim may need to move in earlier.

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receives is a dollar the other party does not. Both sides will make strong efforts to win a fair share (or more) of the \$10, knowing that nothing can be done to increase the size of the pie.⁵²

A non-zero-sum (sometimes called “positive sum” or “integrative”) negotiation is one where both parties focus on expanding the negotiation pie without being concerned about dividing it up.⁵³ Consider the example of three friends who take a two-week vacation every summer. They are negotiating where to go this coming summer. One wants to hike and camp in the Rocky Mountains. Another wants to stay in a five-star hotel in Paris, France. The third person wants to spend the entire two weeks gaming in Las Vegas. After negotiating, the three decide to stay at the Paris Hotel in Las Vegas and hike and camp in nearby Red Rock. They have found an integrative solution that attempts to simultaneously meet (even if not perfectly) the underlying interests of all three people.

Next, consider the example of Matt, who throws his golf clubs on the table and says, “I’m tired of golf and want to stop playing.” Matt’s friend Sally says, “Well, I’m tired of writing novels,” and hoists her laptop computer onto the same table. Matt then says, “Hey, I would like to write a novel!” And Sally says, “Hey, I would like to start playing golf!” They negotiate, and conclude by simply trading the computer for the golf clubs.⁵⁴

If it is worth more to Jim to move in early than it costs Sara to move out early, they may agree to accommodate Jim’s schedule in exchange for compensation to Sara.”). MNOOKIN ET AL., *supra* note 15, at 14–15 (emphasis in original); see also Mnookin, *supra* note 49, at 12.

⁵² See Robert E. Thomas & Bruce Louis Rich, *Under the Radar: The Resistance of Promotion Biases to Market Economic Forces*, 55 SYRACUSE L. REV. 301, 328 n.143 (2005) (“Under distributive negotiation, the goal is to get the best deal for yourself by dividing the negotiation subject in a manner that is most favorable to your side regardless of how the division affects the other side.”).

⁵³ Peters, *Use of Lies*, *supra* note 5, at 31; see also David Brin, *Disputation Arenas: Harnessing Conflict and Competitiveness for Society’s Benefit*, 15 OHIO ST. J. ON DISP. RESOL. 597, 605 n.23 (2000) (“‘Positive sum’ occurs when both sides in a game or conflict or negotiation realize that there are potential strategies under which both can win at the same time.”); John G. Cross, *Negotiation as a Learning Process*, 21 J. CONFLICT RESOL. 581, 585 (1977) (describing the perspective that the bargaining process is a “mechanism for dividing the fruits of cooperation”); William Zartman, *Negotiation as a Joint Decision-Making Process*, 21 J. CONFLICT RESOL. 619, 622 (1977) (discussing negotiation as a “positive-sum exercise”).

⁵⁴ See MARVIN A. CHIRELSTEIN, CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS 2 (4th ed. 2001) (“The trading process is not a poker game in which one player wins what another loses; rather, it is a kind of joint undertaking which increases the wealth of both parties and from which both emerge with a measure of enhanced utility.”); Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121,

B. *The Negotiator's Dilemma*

Even in the simple negotiation just concluded by Matt and Sally, parties must be mindful of the Negotiator's Dilemma. The Dilemma, which confronts every party at the start of every negotiation, is the following: "How much information should I reveal to the other party, and when should I reveal it?"⁵⁵ After all, one needs to disclose information to increase the size of the pie ("I want to stop playing golf, so let's negotiate a deal for my clubs"), and yet, simultaneously, he or she is concerned that particular pieces of information, if disclosed, might be used by another party to claim a larger share of that pie ("If you want to stop playing, then surely you'll sell your clubs for practically nothing. Would you accept \$10?").⁵⁶

Professor Howard Raiffa, in a well-known series of lectures delivered at Harvard, argued that value creation in negotiation is maximized under conditions of "FOTE" (Full, Open, Truthful Exchange).⁵⁷ However, it appears that negotiating under conditions of FOTE is in tension with the Negotiator's Dilemma, and a negotiator must therefore balance how "full" and "open" to be, given how the information could potentially be used by other parties for exploitive purposes.

Fisher, Ury, and Patton present the paradigmatic story of two sisters fighting over the last orange in the refrigerator: the parents, hearing enough, decide to cut the orange and give each sister half. It is later learned that while one sister was hungry and wanted only the *fruit* of the orange, the other sister was baking and wanted only the *zest*.⁵⁸ They argue that if each sister had

1128–29 (1998) ("Two parties can maximize their total utility in the use of their separate resources when they trade assets and services.").

⁵⁵ See DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* 154–82 (1986).

⁵⁶ Peters, *Use of Lies*, *supra* note 5, at 48; see also MNOOKIN ET AL., *supra* note 15, at 17 ("[W]ithout sharing information it is difficult to create value, but when disclosure is one-sided, the disclosing party risks being taken advantage of."). Others have also said:

[W]hen both parties fully disclose information, the chances for an excellent agreement rise dramatically because each better understands and can accommodate the other's needs. However, if only one of the parties discloses information, he or she becomes vulnerable to exploitation by the other. When neither party discloses, the chances for an effective agreement are dimmed because neither party knows what the other wants, and it is therefore difficult to explore "win-win" options.

Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 HARV. NEGOT. L. REV. 1, 68 (2000)

⁵⁷ HOWARD RAIFFA, *LECTURES ON NEGOTIATION ANALYSIS* 11 (1996).

⁵⁸ The "zest" is the outermost part of an orange, used for flavoring.

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been able to learn the “underlying interest” of the other, then both sisters could have gotten 100% of what they wanted, instead of 50%.⁵⁹

The orange story appears to bolster Professor Raiffa’s advice for a “Full, Open, Truthful Exchange.” This article suggests that such advice needs to be critically examined and, at times, tempered—especially when other parties are willing to engage in lies and deception for strategic purposes.

Example One

Consider, for example, a similar orange negotiation between two sisters, Mary and Sally. Mary is hungry and wants only the fruit of the orange. Sally is baking and wants only the zest. If Mary is more mindful of the Negotiator’s Dilemma, and if she is willing to lie for exploitive advantage, the following exchange could easily take place:

Mary: I want the orange!

Sally: I want the orange, too!

Mary: Tell me what your underlying interests are—why do you want the orange?

Sally: I’m baking, so I only want the zest.

Mary: That’s the only part I’m interested in as well. How about giving me the fruit, which I don’t really want that much anyway, and also give me fifty cents. Then you can have the zest.

Sally: Deal!

So Sally receives the zest, but Mary receives the fruit of the orange (which is all she wanted to begin with) and fifty cents on top of it (with which she could purchase yet another orange). The point is this: People lie in negotiations because it can be extremely effective.⁶⁰ In every negotiation, no

⁵⁹ FISHER, URY & PATTON, *supra* note 15, at 42, 57.

⁶⁰ Peters, *Attorney Truthfulness*, *supra* note 35, at 138 (“Lies about non-monetized interests and priorities help deceivers claim value, but do nothing to create value. They help negotiators divide a pie favorably in their self-interests, but do nothing to expand a pie to benefit all.”); *see also* Peters, *Use of Lies*, *supra* note 5, at 40 (“In every negotiation each party has incentives for deception.”).

matter how much value-creation occurs to increase the size of the negotiation pie, there comes a point at which that pie needs to be divided.⁶¹

Example Two

Assume that Mr. Seller is negotiating to sell a house and that his reservation price (or “bottom line”) is \$90,000. He will not sell for less than that amount. Ms. Buyer wants to buy the house. Mr. Seller estimates that Ms. Buyer’s ceiling price is \$120,000. (By the way, Mr. Seller is exactly right regarding this piece of information, even though there’s no way for him to confirm it). After negotiating for several weeks, Mr. Seller, by lying about a competing bid (“Someone has just offered me \$110,000!”), has persuaded Ms. Buyer that he will not sell the property for anything less than \$110,000 (a figure that is \$20,000 above his actual reservation price). They continue to negotiate and eventually split the difference between Mr. Seller’s *perceived* reservation price (\$110,000) and Ms. Buyer’s *actual* reservation price (\$120,000). With a final selling price of \$115,000, Ms. Buyer is happy because she believes she has captured exactly half of the available surplus. Mr. Seller is extremely happy, believing (correctly) that he has captured \$25,000 of the \$30,000 surplus, and that he owes it all to his ability as an effective liar.

Example Three

An art gallery owner has a billionaire client looking for a particular portrait painted by the famed artist, Pigato. The painting will complete the billionaire’s collection, and he is willing to pay \$500,000 to any gallery that tracks it down. The next day, an impoverished art student walks into the art gallery carrying the very portrait being sought by the billionaire client. The gallery owner immediately recognizes the painting but effectively hides his glee from the student. The following exchange takes place:

Art Student: I want to sell you this Pigato painting. It’s a beloved family heirloom, but I need the money to buy food and medication for my sick grandmother.

Gallery Owner: I might be interested even though I already have three other Pigato paintings currently hanging here in my gallery.

⁶¹ See Peters, *Use of Lies*, *supra* note 5, at 40 (stating that “every negotiation has zero-sum elements.”).

According to the *Official Art Auctions Book of the World*,⁶² the most recent auctions selling Pigato paintings, all held in the last two years, sold each of twelve different Pigato paintings, of various sizes and conditions, for somewhere between \$2,000 and \$3,000. I will therefore offer you \$2,750 for the painting.

Art Student: Are you going to hang the painting here in the gallery and hope it sells, or have you already found a buyer for the painting?

Gallery Owner: We purchase paintings from people like you every single day and try to re-sell them as quickly as we possibly can. That's what our business is all about. Do we have a deal or not?

Art Student: OK, \$2,750 sounds pretty good—it's a deal.

In the next section I analyze these three examples.

C. Drilling for Information

In Example One, with the orange, one party lied about her underlying interests (she said she wanted the orange's zest when in fact she only wanted the fruit). In Example Two, with the house for sale, one party lied about his best alternative to a negotiated agreement (BATNA).⁶³ The party said he had a competing bidder when in fact he did not. In Example Three, the gallery owner did not lie—in fact, according to the working definitions of "lie" and "deception," it could be argued that the gallery owner did not even engage in the (seemingly) lesser evil of deception. Rather, he successfully avoided responding to a question (sometimes called "blocking")⁶⁴ asked by the art student ("Have you already found a buyer for this painting?") and the student failed to dig deeper for a response that would have addressed the question directly.

⁶² This is a fictitious name for a comprehensive book on the art auction world that is similar to the Kelley Blue Book in the automobile world; the book will provide credible objective standards for the negotiation.

⁶³ See FISHER, URY & PATTON, *supra* note 15, at 97–106.

⁶⁴ See Paul F. Eckstein, *Book Review: Seeking Negotiation's Cutting Edge*, 40 ARIZ. ATT'Y 11 (2004) (discussing various "blocking techniques" to avoid answering difficult questions).

These three examples illustrate the difficulty in unearthing information necessary to prevent oneself from being exploited during negotiation, whether through lies, deception, or something approaching either one. In each example, how might one have continued to “drill deeper”? What kinds of questions could the duped person have asked to keep the conversation going, and keep the information flowing?

In Example One, the orange negotiation, Sally should have been suspicious when Mary went ahead and took the fruit, even though she had previously claimed she did not want the orange “that much anyway.” Sally could have asked, “Why are you taking the orange if you aren’t that interested in it?” Sally, who said she wanted the zest for baking, also could have asked Mary, “*Why* are you interested in the zest?” Because Mary was lying about wanting the zest, she may not have prepared an answer for such a question. Many times in a negotiation, simply asking “why?,” sometimes repeatedly and in different ways,⁶⁵ can be an effective tool in getting at important information.

In Example Two, the sale of the house, Mr. Seller lies and says he has a competing bid for \$110,000. At that point it was crucial for Ms. Buyer to ask questions about the competing bidder (“Can we meet with this person? Can we meet with their realtor? Can you document the bid?”) in order to ensure that the bid is not a lie. A comfortable and well prepared liar might have quick and confident sounding responses for such questions, but many people will not.

And in Example Three, the gallery situation, the art student asked an excellent question: “Have you already found a buyer for the painting?” The gallery owner was effective in “blocking” the question. The art student should have circled back and asked the same question until he received a satisfactory answer. Of course, the gallery owner could have lied in his initial response to the question by saying, “No, we don’t have a buyer in mind. Hopefully we will find one soon.” At that point, the art student could request that the gallery owner take the painting on consignment (act as a broker instead of a cash purchaser in the deal—taking a percentage of whatever amount the painting is eventually sold for and passing the rest on to the art student). The gallery owner might well respond by saying he has a strict policy against doing so. At that point the art student might try to learn, through questioning the gallery owner, *why* that is the case—because not

⁶⁵ Of course, one can ask “Why?” in countless ways, including, “Could you say a little bit more about that?” or “That’s interesting, what do you mean by that?” or “How do you know that to be the case?”—basically, any statement, usually in the form of a question or request, that will keep the other party talking and providing information.

having good reasons for taking firm stances can tend to raise suspicions—and whether an exception could be made for that particular transaction.

The three examples illustrate the power of information in negotiation, and how important it is to attempt to dig up complete and accurate information throughout the process. As Professor Wetlaufer concludes in his seminal article on the ethics of lying in negotiations:

Two things . . . are clear. The most important is that we cannot say as a general matter that honesty is the best policy for individual negotiators to pursue if by “best” we mean most effective or most profitable. In those bargaining situations which are at least in part distributive, a category which includes virtually all negotiations, lying is a coherent and often effective strategy. In those same circumstances, a policy of never lying may place a negotiator at a systematic and sometimes overwhelming disadvantage. Moreover, there are any number of lies, including those involving reservation prices and opinions, that are both useful and virtually undiscoverable. Accordingly, if the policy we pursue is one of honesty, we must do so for reasons other than profit and effectiveness. The second point is that one who lies in negotiations is in a position to capture almost all of the benefits of lying while suffering only a small portion of the costs and that, in the language of the economists, this state of affairs will lead, almost automatically, to an overproduction of lies.⁶⁶

The circumstances faced in many negotiations are similar to those faced in many Prisoner’s Dilemma problems⁶⁷ wherein the incentive to “defect” (that is, to act self-interestedly rather than cooperatively) is very high: (1) the stakes are high in terms of potential gains and losses; (2) information regarding other negotiation parties is in short supply (or is nonexistent); and (3) neither side can predict with certainty whether or not the other side will defect (or in the case of negotiation, lie). Under such conditions, it has been

⁶⁶ Wetlaufer, *supra* note 9, at 1230. Of course, Professor Wetlaufer appears to ignore reputational consequences. *See supra* note 20.

⁶⁷ Prisoner Dilemma problems enable one to think about situations (such as negotiations) in which each party must decide whether to act in a cooperative or a competitive manner toward the other party. The paradigmatic example plays out on TV nearly every night on various crime shows: two crime suspects are in jail awaiting trial for a crime they committed together. The prosecutor says to each suspect, “If you testify against your accomplice, I will give you less time in jail than if you do not testify.” If neither party testifies (or defects), they each get two years in jail. If both parties testify, they each get three years. If just one party testifies, that person receives one year and the other receives four years. In such a two-person prisoner’s dilemma, a player receives the greatest “payoff” if the other party remains loyal while she herself defects. The prisoner’s dilemma serves as a model for certain situations in life in which “the pursuit of self-interest by each leads to a poor outcome for all.” ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 7 (1984); *see also* RAIFFA, *supra* note 32, at 123–26.

suggested that “only saints and fools can be relied on to tell the truth.”⁶⁸ This dynamic, however, might be altered if the amount of information flowing between the parties can somehow be increased. The information flow will increase if the parties are taught to engage aggressively and relentlessly in asking questions, seeking information, and digging for answers.

And yet, when attorneys engage in the rough and tumble behaviors that constitute “digging for answers,” there is often a tension between honesty and less-than-honesty. On the one hand, the lawyer must be a strong advocate, willing to do almost *anything* to prevail: in his famous defense of Queen Caroline, Lord Brougham implores counsel to “save that client by all means and expedients, and at all hazards and costs to other persons” and to disregard “the alarm, the torments, the destruction which he may bring upon others” in so doing.⁶⁹ On the other hand, the Model Rules of Professional Conduct remind lawyers they are “officer[s] of the legal system” and “public citizen[s] having special responsibility for the quality of justice.”⁷⁰ Toward this end, lawyers are to be fair with opposing parties and opposing counsel,⁷¹

⁶⁸ Wetlaufer, *supra* note 9, at 1233; see also RUSSELL KOROBKIN, *NEGOTIATION THEORY AND STRATEGY* 238 (2002) (“[I]t is intuitively appealing for negotiators to consider misrepresenting and obfuscating their preferences in an effort to claim a larger share of the cooperative surplus.”); Kathleen M. O’Connor & Peter J. Carnevale, *A Nasty But Effective Negotiation Strategy: Misrepresentation of a Common-Value Issue*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 504, 507–13 (1997) (discussing a negotiation simulation in which 28% of the subjects engaged in misrepresentation, either by lying or by failing to correct a statement made by the other party. On average, negotiators who misrepresented earned higher scores than those who did not, and 92% of misrepresenters earned a higher score than their counterpart); see generally Scott R. Peppet, *Can Saints Negotiate? A Brief Introduction to the Problems of Perfect Ethics in Bargaining*, 7 HARV. NEGOT. L. REV. 83 (2002).

⁶⁹ Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1060 n.1 (1976) (quoting Statement of Lord Brougham, 2 TRIAL OF QUEEN CAROLINE 8 (J. Nightingale ed. 1821)); see also Deborah L. Rhode, *An Adversarial Exchange on Adversarial Ethics: Text, Subtext, and Context*, 41 J. LEGAL EDUC. 29, 29 (1991); Kimberlee K. Kovach, *Privatization of Dispute Resolution: In the Spirit of Pound, but Mission Incomplete: Lessons Learned and a Possible Blueprint for the Future*, 48 S. TEX. L. REV. 1003, 1020 (2007) (discussing how, in the context of both mediation and negotiation, the “paradigm of adversarialism . . . overshadows other approaches.”); RICHARD ZITRIN & CAROL M. LANGFORD, *THE MORAL COMPASS OF THE AMERICAN LAWYER: TRUTH, JUSTICE, POWER, AND GREED* 165 (1999) (“A fundamental tenet of the adversary theorem is that lawyers need not be completely candid with the other side.”).

⁷⁰ MODEL RULES OF PROF’L CONDUCT PREAMBLE (2002).

⁷¹ MODEL RULES OF PROF’L CONDUCT R. 3.4 (2002).

and they are not to make materially false statements to others.⁷² There is clearly a similar tension endemic to negotiation:

Like the poker player, a negotiator hopes that his opponent will overestimate the value of his hand. Like the poker player, in a variety of ways he must facilitate his opponent's inaccurate assessment. The critical difference between those who are successful negotiators and those who are not lies in this capacity both to mislead and not to be misled.

Some experienced negotiators will deny the accuracy of this assertion, but they will be wrong. I submit that *a careful examination of the behavior of even the most forthright, honest, and trustworthy negotiators will show them actively engaged in misleading their opponents about their true positions . . .* To conceal one's true position, to mislead an opponent about one's true settling point, is the essence of negotiation.⁷³

On the one hand, exhibiting cooperative behaviors during a negotiation (including sharing information, brainstorming ways to meet all parties' underlying needs,⁷⁴ and making trades⁷⁵ leading to gains for all parties⁷⁶) can allow for effective value creation—for the creation of a “bigger pie.” On the other hand, when it is time to divide that pie, the more distributive aspects of negotiation (including bluffing, puffing, and lying⁷⁷) can ensure one receives a larger share of that pie.⁷⁸ How does one manage that tension?⁷⁹ How can

⁷² MODEL RULES OF PROF'L CONDUCT R. 4.1 (2002); *see also* ZITRIN & LANGFORD, *supra* note 69, at 3 (“Every day, American lawyers in a wide variety of practices face competing ethical principles—among the most important, the choice between representing a client's interests diligently and being truthful in one's words and deeds.”).

⁷³ White, *supra* note 21, at 927–28 (emphasis added).

⁷⁴ MNOOKIN ET AL., *supra* note 15, at 37; *see also* STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., *ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS* 303 (2d ed. 2003).

⁷⁵ *See generally* Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193 (1991).

⁷⁶ It is clear that “differences are often more useful than similarities in helping parties reach a deal” because it is differences that “set the stage for possible gains from trade.” MNOOKIN ET AL., *supra* note 15, at 14.

⁷⁷ *See* Robert J. Rhee, *A Price Theory of Legal Bargaining: An Inquiry into the Selection of Settlement and Litigation Under Uncertainty*, 56 EMORY L.J. 619, 633 (2006) (discussing the motivation for “strategic bargaining behaviors such as the assertion of excessive valuations, deliberate misrepresentation, ‘hard’ bargaining, calculated delay, obstruction, and other arguably noncooperative behavior.”).

⁷⁸ *See* JEFFREY Z. RUBIN & BERT R. BROWN, *THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION* 15 (1975) (“To sustain the bargaining relationship, each party must select a middle course between the extremes of complete openness toward,

one be a truly effective negotiator in terms of growing the largest pie possible, yet still be committed to fairness, ethics, and integrity when the time comes for pie-splitting? Many scholars have concluded that while this tension cannot be completely resolved, it can be managed.⁸⁰ The goal of negotiation becomes creating an environment, designing a process, and implementing behaviors that allow value creation to occur where possible, while simultaneously being aware of (and thereby minimizing) risks for exploitation.⁸¹

IV. RULES REGARDING TRUTHFULNESS

One scholar of negotiation ethics declares that, “[i]n negotiation, people who rely on the letter of legal rules as a strategy for plotting unethical conduct are very likely to get into deep trouble. But people who rely on a cultivated sense of right and wrong to guide them in legal matters are likely to do well.”⁸² Perhaps an understanding of the “legal rules” on truthfulness can play a foundational role in developing such a “cultivated sense of right and wrong.” With that in mind, the starting point for exploring ethical norms governing lying and deception in negotiations is Rule 4.1⁸³ of the ABA Model Rules of Professional Conduct.⁸⁴ The Rule provides:

and total deception of, the other. Each must be able to convince the other of his integrity while not at the same time endangering his bargaining position.”).

⁷⁹ White states that the paradox of the lawyer’s goal in negotiation is how to “be ‘fair’ but also mislead.” White, *supra* note 21, at 928.

⁸⁰ MNOOKIN ET AL., *supra* note 15, at 27.

⁸¹ *Id.*

⁸² Shell, *supra* note 10, at 99.

⁸³ Rule 4.1 only governs lying and deception by lawyers. This article involves a broader discussion of common law fraud, which, of course, applies to lawyers and non-lawyers alike.

⁸⁴ Model Rule 8.4, which is a bit more general than Model Rule 4.1, broadly proscribes lawyers from engaging in conduct involving “dishonesty, fraud, deceit, or misrepresentation.” MODEL RULES OF PROF’L CONDUCT R. 8.4(c) (2002). In a Formal Opinion, the ABA’s Standing Committee on Ethics and Professional Responsibility states that Rule 8.4(c):

[D]oes not require a greater degree of truthfulness on the part of lawyers representing parties to a negotiation than does Rule 4.1 . . . Indeed, if Rule 8.4 were interpreted literally as applying to any misrepresentation, regardless of the lawyer’s state of mind or the triviality of the false statement in question, it would render Rule 4.1 superfluous, including by punishing unknowing or immaterial deceptions that would not even run afoul of Rule 4.1 . . . Suffice it to say that, whatever the reach of Rule 8.4(c) may be, the Rule does not prohibit conduct that is permitted by Rule 4.1(a)..

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Rule 4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.⁸⁵

Rule 4.1(a), then, applies only to statements of material fact or law that the lawyer knows to be false, and thus does not cover false statements that are made unknowingly, that concern immaterial matters, or that relate to neither fact nor law.

Within the context of truthfulness in negotiation, whether the topic of inquiry is misrepresentations, half-truths,⁸⁶ or nondisclosure, the focus nevertheless centers on the same two components: statements and omissions.⁸⁷ Even though Rule 4.1 prohibits false statements of material fact,

ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-439 n.2 (2006). Nevertheless, Model Rule 8.4(c) "can and has been invoked" to ensure lawyers comply with their duties "to be honest and fair in negotiation." Menkel-Meadow, *Ethics, Morality*, *supra* note 7, at 137-38.

⁸⁵ MODEL RULES OF PROF'L CONDUCT R. 4.1 (2002).

⁸⁶ A half-truth is a statement that, although technically accurate, is nonetheless misleading in some way. As stated in the Restatement (Second) of Torts, "[a] representation stating the truth so far as it goes but which the maker knows or believes to be materially misleading because of his failure to state additional or qualifying matter is a fraudulent misrepresentation." RESTATEMENT (SECOND) OF TORTS § 529 (1977). Similarly, the Restatement (Second) of Contracts states that "[a] statement may be true with respect to the facts stated, but may fail to include qualifying matter necessary to prevent the implication of an assertion that is false with respect to other facts." RESTATEMENT (SECOND) OF CONTRACTS § 159 cmt. b (1981); *see also* William B. Goldfarb, *Fraud and Nondisclosure in the Vendor-Purchaser Relation*, 8 W. RES. L. REV. 5, 24 (1956) ("While silence alone may not be actionable, if the vendor undertakes to speak, he must not conceal anything which would tend to qualify or contradict the facts which he had stated. In other words, to tell half of the truth is to make a half-false representation."); Langevoort, *supra* note 9, at 96 n.34 ("[M]ost treatises assume that the half-truth doctrine is simply a species of actionable nondisclosure.").

⁸⁷ On the distinction between omissions and half-truths, *see* Langevoort, *supra* note 9, at 96:

Just as there is no clean distinction between classic misrepresentations and half-truths, neither is there one between half-truths and nondisclosure . . . Almost all nondisclosure cases arise in bargaining settings where there is indeed much said between the parties. Under these circumstances, what the court is being asked to do is determine what inferences the buyer can fairly draw from the seller's statements and omissions.

it has generally been interpreted to permit misrepresentations with respect to estimates of price or value, and with respect to a party's intentions as to an acceptable settlement (what amount of money or other benefits would make for an acceptable "deal").⁸⁸ The official commentary states that "[u]nder generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category . . ."⁸⁹

The prohibition of Model Rule 4.1 against lying about material facts is similar to substantive doctrines of fraud.⁹⁰ One legal ethics scholar points out that state legislatures, courts, and other regulatory bodies (such as the American Law Institute and the National Conference of Commissioners on Uniform State Laws) have been expanding the meaning and scope of fraud law in the United States.⁹¹

Id.

⁸⁸ Note, however, that while one is permitted to make misrepresentations to opposing counsel on these matters, one is nevertheless forbidden from lying to a *judge* on these same matters; states the ABA's formal opinion on the issue: "The proper response by a lawyer to improper questions from a judge [on such matters] is to decline to answer, not to lie or misrepresent." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-370 (1993).

⁸⁹ MODEL RULES OF PROF'L CONDUCT R. 4.1 CMT. 2 (2002). Note, moreover, that care must be taken by a lawyer to prevent communications from being conveyed in language that converts them, even inadvertently, into false factual representations. For example, the ABA Standing Committee on Ethics and Professional Responsibility in one of its formal opinions states that:

[E]ven though a client's Board of Directors has authorized a higher settlement figure, a lawyer may state in a negotiation that the client does not wish to settle for more than \$50. However, it would not be permissible for the lawyer to state that the Board of Directors had *formally disapproved* any settlement in excess of \$50, when authority had in fact been granted to settle for a higher sum.

ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-439 (2006) (emphasis added).

⁹⁰ See Langevoort, *supra* note 9, at 91 ("Fraud is about human discourse, which is necessarily contextual and fact-specific.").

⁹¹ Menkel-Meadow, *Ethics, Morality*, *supra* note 7, at 141. Reflecting these trends, the Ethics 2000 Commission amended the comments to Model Rule 4.1 to state that a misrepresentation can occur if the lawyer "incorporates or affirms a statement of another person that the lawyer knows is false," or if the lawyer makes "partially true but misleading statements or omissions that are the equivalent of affirmative false statements." MODEL RULES OF PROF'L CONDUCT R. 4.1 CMT. 1 (2002); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000) (including several sections dealing with appropriate negotiation behavior and disclosure requirements, such

Common law fraud generally requires five elements: (1) a false representation of a material fact made by the defendant; (2) with knowledge or belief as to its falsity; (3) with an intent to induce the plaintiff to rely on the representations; (4) justifiable reliance on the misrepresentation by the plaintiff; and (5) damage or injury to the plaintiff by the reliance.⁹² Victims can avoid the deal in contract fraud, or they can sue in tort fraud for damages.⁹³

A. *The Duty of Disclosure*

Generally, the law does not impose a duty on negotiating parties to disclose information that is harmful to their respective positions,⁹⁴ thereby burdening all parties to conduct their own background research, vigorously question their negotiation counterpart(s), and take other proactive steps to unearth or extract such information. In some cases, however, the courts have imposed a duty to disclose. Professor Nicola Palmieri has identified the following seven circumstances in which courts have recognized a duty to disclose:⁹⁵

- (1) all material facts that have been actively concealed must be disclosed;⁹⁶
- (2) prior statements that are later discovered to be or turn out to be false

as Section 66 (Using or Disclosing Information to Prevent Death or Bodily Harm), Section 67 (Using or Disclosing Information to Prevent, Rectify, or Mitigate Substantial Financial Loss), and Section 98 (Statements to a Nonclient)).

⁹² W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 107–09 (5th ed. 1984); RESTATEMENT (SECOND) OF TORTS §§ 525, 531 (1977). Calamari and Perillo state the five elements more succinctly: (1) representation; (2) falsity; (3) scienter; (4) deception; and (5) injury. JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 9.13 at 326 (4th ed. 1998).

⁹³ According to Calamari and Perillo, tort damages are usually more difficult to prove than mere restitution: “[i]nasmuch as [restitution] is designed merely to restore the situation that existed prior to the transaction, it is not surprising that the requisites necessary to make out a case for restitution are far less demanding than those necessary to make out a tort action.” CALAMARI & PERILLO, *supra* note 92, at 326.

⁹⁴ See *id.* at 336–40; see, e.g., *Mitchell Energy Corp. v. Samson Res. Co.*, 80 F.3d 976, 985 (5th Cir. 1996) (noting that absent a special relationship, there is no duty to disclose information about a gas well).

⁹⁵ See Nicola W. Palmieri, *Good Faith Disclosures Required During Precontractual Negotiations*, 24 SETON HALL L. REV. 70, 120, 125–141 (1993).

⁹⁶ Concealment usually occurs when one party actively attempts to hide the true facts from the other party or parties by using some kind of trick intended to prevent discovery of (or inquiry into) the concealed fact. See, e.g., *Hays v. Meyers*, 107 S.W. 287, 289 (Ky. 1908); *Patten v. Standard Oil Co. of Louisiana*, 55 S.W.2d 759, 761 (Tenn. 1933).

must be corrected;⁹⁷ (3) all material facts must be disclosed if anything is said;⁹⁸ (4) all material facts must be disclosed when there is a fiduciary or confidential relationship between the parties;⁹⁹ (5) superior material information concerning a transaction must be disclosed when the other party cannot reasonably discover the information and is under a mistaken belief with regard to it;¹⁰⁰ (6) all material facts must be disclosed in the

⁹⁷ Even if the original representation was in fact true (or was believed to be true by the speaker) at the time it was communicated, if later events make that original statement false, or if the speaker learns that the original statement he or she made was in fact false, then there is a duty to disclose this information to correct the original representation. *See* KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 696–97 (4th ed. 1971).

⁹⁸ Even when there is no duty to disclose, if a party *volunteers* to speak, or if a party speaks in response to questions, then the response must be “full and fair.” This rule was set forth by the California Supreme Court:

Even though one is under no obligation to speak as to a matter, if he undertakes to do so, either voluntarily or in response to inquiries, he is bound not only to state truly what he tells but also not to suppress or conceal any facts within his knowledge which will materially qualify those stated. If he speaks at all he must make a full and fair disclosure . . . Where there is a duty to disclose, the disclosure must be full and complete, and any material concealment or misrepresentation will amount to fraud sufficient to entitle the party injured thereby to an action.

Pashley v. Pac. Elec. Railway Co., 153 P.2d 325, 330 (Cal. 1944).

⁹⁹ Generally, courts have held that sophisticated business people negotiating arm’s length business deals are not fiduciaries and therefore are not required to provide full disclosure of all material facts related to the transaction. *See, e.g.*, *The Original Great Am. Chocolate Chip Cookie Co., Inc. v. River Valley Cookies*, 970 F.2d 273, 280 (7th Cir. 1992) (stating that parties to a contract are not fiduciaries to each other). However, courts have recognized numerous other confidential or fiduciary relationships requiring full disclosure, including relationships between: employer and employee (*see, e.g.*, *U.S. v. Margiotta*, 688 F.2d 108, 124 (2d Cir. 1982)); family members (including people engaged to be married) (*see, e.g.*, *U.S. v. Ressler*, 433 F. Supp. 459, 464 (S.D. Fla. 1977)); attorney and client (*see, e.g.*, *Cinema 5 v. Cinerama, Inc.*, 528 F.2d 1384, 1386 (2d Cir. 1976)); stockholders and officers of the corporation (*see, e.g.*, *Davis Bluff Land & Timber Co. v. Cooper*, 134 So. 639, 641 (Ala. 1931)); joint purchasers (*see, e.g.*, *Walker v. Pike County Land Co.*, 139 F. 609, 611 (8th Cir. 1905)); joint owners selling jointly owned property (*see, e.g.*, *Upton v. Weisling*, 71 P. 917, 920 (Ariz. 1903)); joint venturers (*see, e.g.*, *Stevens v. Marco*, 305 P.2d 669, 679 (Cal. Dist. Ct. App. 1956)); physician and patient (*see, e.g.*, *Nardone v. Reynolds*, 538 F.2d 1131, 1135 (5th Cir. 1976)); and priest and parishioner or rabbi and congregation (*see, e.g.*, *Finegan v. Theisen*, 52 N.W. 619, 622 (Mich. 1892)).

¹⁰⁰ The duty to disclose is particularly compelling when one party has superior knowledge and the unknowing party has been induced to take action it otherwise might not have taken. *See, e.g.*, *Mann v. Adams Realty Co., Inc.*, 556 F.2d 288, 297 (5th Cir. 1977).

formation of insurance and suretyship contracts;¹⁰¹ and (7) all material facts must be disclosed as required by statute.¹⁰²

Professor Palmieri argues that these seven exceptions to the general rule that a party may remain silent have been used “in an ever widening array of circumstances,” to the point “that the exceptions have almost subsumed the rule of nondisclosure.”¹⁰³ Indeed, she believes the exceptions are broad enough “that a resourceful judge can almost always find a way to fit the facts of a case within the confines of one of the exceptions.”¹⁰⁴ Other scholars have suggested that this area of law is quite murky and that even a list of exceptions such as Professor Palmieri’s might not be particularly useful for predictive purposes:

[N]umerous legal commentators have analyzed the law of fraudulent silence (also referred to as actionable nondisclosure or actionable silence) in an attempt to identify some guiding principle that will rationalize the cases and generate accurate predictions of how courts will rule. Although some commentators point to various specific factors (for example, whether the withheld information related to a latent defect or whether the litigating parties were in a confidential or fiduciary relationship) that courts consider either alone or in some combination, others conclude that courts provide no useful rule of law.¹⁰⁵

¹⁰¹ The concern is the inequality of knowledge between the parties, which forces the insurer to rely on the information provided by the insured when assessing risk. Note that courts have held that a change in circumstances after the policy has been issued nonetheless requires the insured to inform the insurer of said change, provided it was substantial and would have led the insurer to cancel the policy or increase premiums if the insurer had known about the risk. *See Weems v. Am. Sec. Ins. Co.*, 450 So.2d 431, 436 (Miss. 1984).

¹⁰² Palmieri, *supra* note 95, at 120. For example, the National Labor Relations Act addresses issues of good faith as it relates to collective bargaining and mandates that “the employer and the representative of the employees meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement . . .” 29 U.S.C. § 158(d) (2009). Congress, too, has mandated a duty to disclose in various consumer protection statutes. *See, e.g.*, Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1716 (2009); Truth-in-Lending Act, 15 U.S.C. § 1601 (2009); Securities Exchange Act of 1934, 15 U.S.C. § 78a–78kk (2009).

¹⁰³ Palmieri, *supra* note 95, at 125.

¹⁰⁴ *Id.*

¹⁰⁵ Kimberly D. Krawiec & Kathryn Zeiler, *Common-Law Disclosure Duties and the Sin of Omission: Testing the Meta-Theories*, 91 VA. L. REV. 1795, 1797 (2005); *see also* Paula J. Dalley, *The Law of Deceit, 1790–1860: Continuity Amidst Change*, 39 AM. J. LEGAL HIST. 405, 407 (1995) (discussing the law of fraud, including the law of fraudulent silence, and noting that “there does not seem to be any factor which accurately

Adding more murkiness is the notion that there is a privilege of “deserved informational advantage” that can act as a limit on the duty to disclose.¹⁰⁶ Essentially, the advantage is gained by any party willing to invest time and effort into acquiring information through investigation, research, and analysis.¹⁰⁷ Professor Alan Strudler states:

[O]ther things being equal, the more value one brings to the bargaining table, the more one may fairly insist upon as return According to the deserved advantage principle account, a buyer’s acquisition of information that increases the value of the object being sold in a negotiation warrants some additional measure of bargaining strength, and a privilege of buyer nondisclosure . . . protects the buyer in getting a fair return on the valuable information that she brings to the table.¹⁰⁸

Consider the buyer who, through diligent investigation, learns the seller’s property has been underpriced. Should the buyer have to disclose this information? Professor Donald Langevoort suggests the answer to that and similar questions, though perhaps not always clear-cut, appears to be gaining clarity: “Though the law of nondisclosure is fluid and fuzzy, there is widespread recognition that parties to a negotiation are privileged to withhold at least some crucial information from the other, lest there be a disincentive to the socially beneficial production or discovery of that sort of information.”¹⁰⁹

predicts which policy a particular court will find determinative in a particular case, other than the merits of the case”).

¹⁰⁶ Langevoort, *supra* note 9, at 98.

¹⁰⁷ Alan Strudler & Eric W. Orts, *Moral Principle in the Law of Insider Trading*, 78 TEX. L. REV. 375, 419–20 (1999) (discussing deserved informational advantages in securities trading).

¹⁰⁸ Alan Strudler, *Moral Complexity in the Law of Nondisclosure*, 45 UCLA L. REV. 337, 374–75 (1997). Professor Strudler adds:

The commercial world teems with . . . intermediaries or middlemen, from jobbers and distributors to stockbrokers and real estate agents. A financial intermediary is a bargain hunter; whether searching garage sales for impressionist works of art or inexpensive farm land for mineral deposits, she seeks to buy low and sell high. A bargain hunter’s job involves exploiting a seller’s lack of knowledge.

Id. at 345; see Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1 (1978) (putting forth an economics based argument about disclosure and information incentives); *but cf.* Robert L. Birmingham, *The Duty to Disclose and the Prisoner’s Dilemma: Laidlaw v. Organ*, 29 WM. & MARY L. REV. 249 (1988) (criticizing Kronman’s economic analysis and arguing that he gets the law of unilateral mistake wrong).

¹⁰⁹ Langevoort, *supra* note 9, at 89–90. Professor Langevoort later states:

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A further limit on the duty to disclose is woven into Model Rule 4.1(b), which requires disclosure of material fact “when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.”¹¹⁰ This “unless” clause imposes a fairly major limitation on disclosure because Rule 1.6(a) forbids a lawyer from revealing confidential client information “unless the client gives informed consent.”¹¹¹ It follows that if a client instructs the lawyer to keep certain information secret, Rules 1.6 and 4.1(b) work together to require the lawyer to follow those instructions, effectively limiting disclosure.¹¹²

In summary, in trying to elucidate the complicated and important duty of disclosure in the context of negotiation, I strongly concur with Professor

The goal of the law here is . . . to promote efficiency without chilling the incentive people have to produce or discover useful data. Intuitively, this suggests a line that compels disclosure of important but costly-to-obtain information, but with a *prima facie* privilege of nondisclosure for facts or inferences that are the product of something akin to skill or diligence.

Id. at 95; see Deborah A. DeMott, *Do You Have the Right to Remain Silent?: Duties of Disclosure in Business Transactions*, 19 DEL. J. CORP. L. 65 (1994) (arguing the law of nondisclosure is fairly fluid, making abstract synthesis quite difficult); see also Kronman, *supra* note 108, at 1–2 (arguing that socially valuable “deliberately acquired information” will disappear if those who obtain it through costly research are forced to share it with other parties). Professor Langevoort offers an interesting refinement in this area of the law, centered around the degree of trust between two negotiating parties:

If there is in fact little or no trust between two parties—a truly adversarial setting—it is difficult to justify the [half-truth] doctrine at all. At least *ex ante*, I suspect that in these settings parties will often prefer a default rule of mere technical accuracy, with its reduced risk of *ex post* litigation Conversely, we should expect that negotiations characterized by a high degree of trust should lead to an upward adjustment: a broad half-truth doctrine, one with little privilege to conceal once a matter is addressed at all. In other words, addressing a matter would fully waive the privilege not to disclose.

Langevoort, *supra* note 9, at 98.

¹¹⁰ MODEL RULES OF PROF’L CONDUCT R. 4.1(b) (2002).

¹¹¹ MODEL RULES OF PROF’L CONDUCT R. 1.6(a) (2002).

¹¹² Of course, the Comment to Rule 1.6 also makes clear that lawyers must withdraw from representation rather than allow their services to be used to further a fraud. And Model Rule 8.4(c) similarly provides that “[i]t is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” MODEL RULES OF PROF’L CONDUCT R. 8.4(c) (2002). Any attorney placed in such a situation by his or her client may feel compelled to withdraw, unless the attorney can convince the client that disclosure is the more reasonable course of action. See MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 14 (2000) (“If the lawyer’s services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).”).

Langevoort's concise characterization of the current state of the law: "fluid and fuzzy."¹¹³

B. *Good Faith Requirement (or Lack Thereof) and Puffing*

In turning to contract law, the general view appears to be that negotiations are excluded from coverage of good faith and fair dealing concepts. The Uniform Commercial Code¹¹⁴ and the Restatement (Second) of Contracts¹¹⁵ both apply the concept of good faith to the performance and enforcement of contracts, but neither makes reference to precontractual negotiations. Given that background, most courts have refused to find good faith obligations in precontractual negotiations.¹¹⁶ However, although there might not be a general duty of good faith in commercial negotiations, duties to one's negotiating counterpart, as well as to various third parties, have

¹¹³ Langevoort, *supra* note 9, at 90.

¹¹⁴ See U.C.C. § 1-304 (2009) (imposing an "obligation of good faith").

¹¹⁵ See RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. C (1981).

¹¹⁶ See, e.g., *Four Nines Gold, Inc. v. 71 Constr., Inc.*, 809 P.2d 236 (Wyo. 1991); *Local 900, Union of Paperworkers Int'l v. Boise Cascade Corp.*, 713 F. Supp. 26 (D. Me. 1989). At least one scholar argues that neither the U.C.C. nor the Restatement precludes the application of good faith and fair dealing to precontractual negotiations, noting that:

Although the UCC and Restatement (Second) of Contracts imply a duty of good faith and fair dealing only in contract performance, one cannot infer from this that there is no precontractual duty of good faith and fair dealing. The Restatement (Second) of Contracts and, to a lesser extent, the UCC, contemplated the potential application of the duty of good faith and fair dealing to contract negotiations and did not intend, by negative inference, to foreclose such application.

Palmieri, *supra* note 95, at 90–91. Professor Palmieri later states:

Any attempt to characterize the duty of good faith as merely contractual and thus to deny the existence of the duty when there is no contract is unsustainable because the duty of good faith exists before any contract is ever entered into . . . The duty of good faith belongs to the prevailing practices of the community of people and their notions as to what constitutes the general welfare. It is a duty permanently present whenever human beings deal with each other. A breach of this duty is contrary to public policy and *contra bonos mores* as these concepts are understood by the community. A man of probity and intelligence knows that the practices and opinions of his fellow men, practices and opinions in the midst of which he was born and by which his own mind and conscience have been formed and educated would not let breaches of good faith prevail.

Id. at 105.

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nevertheless been increasing, and lawyers should be mindful of these changing standards.¹¹⁷

At the same time, there has been a decrease in some of the duties, such as the duty to investigate, that traditionally burdened parties on the receiving end of a negotiation information exchange. Historically, in order to recover for fraud based upon a misrepresentation or an omission, a party had to show that it had no knowledge of the concealed facts, and that the true facts would have been difficult to discover through reasonable diligence. In other words, reliance on a misrepresentation was not reasonable when the plaintiff could have, through reasonable diligence, learned the truth.¹¹⁸ The modern trend, however, has been to lessen this duty to investigate; parties now have greater entitlement to rely upon a representation made by another party in a negotiation, without being burdened with a corresponding duty to investigate. Professor Palmieri sums it up by saying, "While the traditional view enforced the concept of caveat emptor, or let the buyer beware, cases following the modern trend impose a new standard: caveat mendax, or let the liar beware."¹¹⁹

¹¹⁷ For example, some courts have begun to increase the circle of liability (including malpractice claims) to protect third parties who rely on what lawyers say to each other. See generally Ronald E. Mallen, *Duty to Nonclients: Exploring the Boundaries*, 37 S. TEX. L. REV. 1147 (1996) (discussing cases where lawyers have been found to owe a duty of care to individuals outside the traditional attorney-client relationship in matters ranging from estate planning, to family law, to the representation of partnerships and corporations). Mr. Mallen concludes that lawyers' duty to non-clients continues to expand:

In states where no duty was recognized in the past absent privity of contract, courts are now beginning to recognize a duty owed to an intended beneficiary of the attorney-client relationship. In those states that have acknowledged a concept of expanded privity, the rules governing the exception are becoming well defined, though still developmental.

Id. at 1166; see also A.B.A. SECTION OF LITIGATION, ETHICAL GUIDELINES FOR SETTLEMENT NEGOTIATIONS (2002) Sections 2.3 (Duty of Fair-Dealing) and 4.3 (Fairness Issues). While the guidelines aspire to levels of candor and fair dealing that surpass those set forth in the Model Rules of Professional Conduct, their overall impact on negotiation behavior is unclear; the preface to the document states its provisions "are *not* intended to replace existing law or rules of professional conduct or to constitute an interpretation by the ABA of any of the Model Rules, and should not serve as a basis for liability, sanctions, or disciplinary action." *Id.* at 2 (emphasis in original).

¹¹⁸ See, e.g., *Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282, 287 (9th Cir. 1988).

¹¹⁹ Palmieri, *supra* note 95, at 148. Professor Palmieri concludes that:

There has been a slow but steady trend away from caveat emptor towards an application of higher standards of good faith, fair dealing, and morality to all

There has also been increasing scrutiny of lawyers' good-faith participation in various court-annexed negotiations, including pre-trial conferences, early neutral evaluation, mediation, and other court-mandated processes designed to encourage parties to settle disputes without having to go to trial. Lawyers have been sanctioned for failing to participate or for participating in bad faith.¹²⁰ Even outside the confines of a court-annexed program, certain bad faith negotiation behaviors can be addressed by the courts. The matter may be actionable, for example, if a party is using the negotiation process to gain access to trade secrets,¹²¹ or merely for delay.¹²²

There is a difference, of course, between a factual representation and mere praise or opinion—known as “puff.” Securities law, the common law of contracts, and the common law of torts all permit puffing. General commercial law also allows for puffing. For example, the U.C.C. provides that an express warranty is created by “any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain.”¹²³ However, the U.C.C. later states that “an affirmation merely of the value of the goods or a statement purporting to be merely the seller’s opinion or commendation of the goods does not create a warranty.”¹²⁴ These latter affirmations fall in the category of “puffs.” It can be difficult to draw a distinction between permissible puffing¹²⁵ and

contracts and transactions. The doctrine of caveat emptor is being abandoned and the rule that negotiations must be conducted with openness and in good faith is being affirmed.

Id. at 120; *see Harris v. M. & S. Toyota, Inc.*, 575 So. 2d 74, 78 (Ala. 1991) (suggesting a move away from the doctrine of caveat emptor, and toward the more modern trend that parties should be able to rely on representations that are not patently false); *Formento v. Encanto Bus. Park*, 744 P.2d 22, 27 (Ariz. Ct. App. 1987) (buyer can rely on representation that was put forth and has no duty to conduct independent investigation).

¹²⁰ *See, e.g., G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648 (7th Cir. 1989) (holding that the district court did not abuse its discretion in sanctioning a corporation for failing to send a representative to a pretrial settlement conference, as such a burden was not out of proportion to the benefits to be gained by both the litigants and the court).

¹²¹ *See, e.g., Smith v. Snap-On Tools Corp.*, 833 F.2d 578, 580–81 (5th Cir. 1987) (noting that when a manufacturer pursued a trade secret from an inventor, then made use of that trade secret, the manufacturer can be held liable for that use).

¹²² *See Rex R. Perschbacher, Regulating Lawyers' Negotiations*, 27 ARIZ. L. REV. 75, 135–36 (1985) (discussing how negotiating solely for delay, or to burden a third party, resembles the tort of abuse of process).

¹²³ U.C.C. § 2-313 (2)(a) (2004).

¹²⁴ U.C.C. § 2-313 (3) (2004).

¹²⁵ *See, e.g., Cohen v. Koenig*, 25 F.3d 1168, 1172 (2d Cir. 1994) (noting that statements are not fraud if they are “puffery” or opinions regarding future events);

impermissible factual misrepresentation constituting fraud.¹²⁶ Indeed, a leading hornbook on the U.C.C. declares, "anyone who says he can consistently tell a 'puff' from a warranty is a fool or a liar."¹²⁷

In summary, in trying to determine whether, and to what extent, there exists a duty of good faith and fair dealing within the context of negotiation, I would characterize the current state of the law as fairly muddled. Through the murkiness one can nevertheless conclude the following: Though the duty does not rise to one of good faith and fair dealing, negotiators are nevertheless subject to a somewhat lesser duty of care, and they are currently being penalized for certain bad faith behaviors such as using negotiation merely for delay or to gain access to trade secrets. Moreover, it is clear that parties can now more readily rely upon representations made during a negotiation, and their corresponding duty to investigate has been decreased. Finally, when it comes to providing praise or opinion through negotiation "puffing," it can be quite difficult to draw a distinction between permissible puffing and impermissible factual misrepresentation constituting fraud. Together, all of this suggests there remains a good deal of haze and confusion regarding truthfulness rules and standards in law.

To help confirm this somewhat grim conclusion using more empirically-based information, I conducted a survey modeled on a survey from twenty years ago. Data generated from my current survey suggests that confusion

Miller's Bottled Gas, Inc. v. Borg-Warner Corp., 955 F.2d 1043, 1051(6th Cir. 1992), (noting that mere "sales talk" and "puffing" do not reach the level of fraud); Prudential Ins. Co. of Am. v. Jefferson Assocs., Ltd., 896 S.W.2d 156, 163 (Tex. 1995) (holding that manager's statement that building for sale was "superb," "super fine," and "one of the finest little properties" in the city was "puffing" and opinion rather than misrepresentation of fact).

¹²⁶ See, e.g., Melotz v. Scheckla, 801 P.2d 593, 596 (Mont. 1990) (express warranty created by using the words "good running condition"); Pake v. Byrd, 286 S.E.2d 588, 590 (N.C. Ct. App. 1982) (express warranty created by using the words "good condition"); Garrett v. Mazda Motors of Am., 844 S.W.2d 178, 181 (Tenn. Ct. App. 1992) (salesperson's representation to buyer that car had been used mainly by salesperson and had been "babied to death" when the car had actually been stolen and driven 10,000 miles by the car thief, was deemed fraud rather than mere puffery).

¹²⁷ JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 9.4 (4th ed. 1995); see Charles Pierson, *Does "Puff" Create an Express Warranty of Merchantability? Where the Hornbooks Go Wrong*, 36 DUQ. L. REV. 887, 891 (1998) (arguing that "[n]umerous decisions have found that statements that hornbooks would label 'puff' create express warranties."); see, e.g., Ellmer v. Dela. Mini-Computer Sys., Inc., 665 S.W.2d 158, 160-61 (Tex. Ct. App. 1983) (warranty created by describing a computer with the words "first-rate").

over truthfulness rules and standards not only exists, but has actually increased during the last twenty years.

V. DISAGREEMENT AND CONFUSION REGARDING TRUTHFULNESS RULES AND STANDARDS

A. *The 1988 Survey*

An article published twenty years ago entitled *In Settlement Talks, Does Telling the Truth Have Its Limits?* illustrates the differences of opinion among lawyers regarding truthfulness standards in negotiation.¹²⁸ The article's author, Larry Lempert, surveyed fifteen lawyers, asking them how they would respond to four negotiation situations presenting various ethical challenges. The survey participants included eight law professors, five practicing lawyers, a federal judge, and a U.S. magistrate.¹²⁹

There was strong consensus among the participants on only one of the four questions asked in the survey. Following are the four situations, as well as a listing of how the participants responded—i.e., did they respond with “yes,” “no,” or “qualified” (meaning a response that was more qualified or tentative than a straightforward “yes” or “no”):

Situation 1:

Your clients, the defendants, have told you that you are authorized to pay \$750,000 to settle the case. In settlement negotiations after your offer of \$650,000, the plaintiffs' attorney asks, “Are you authorized to settle for \$750,000?” Can you say, “No I’m not”? Yes or no and please explain.

Yes: Seven

No: Six

Qualified: Two

Situation 2:

You represent a plaintiff who claims to have suffered a serious knee injury. In settlement negotiations, can you say your client is “disabled” when you know she is out skiing? Yes or no and please explain.

Yes: One

No: Fourteen

Qualified: None

¹²⁸ See Larry Lempert, *In Settlement Talks, Does Telling the Truth Have Its Limits?*, 2 INSIDE LITIGATION 1 (1988).

¹²⁹ *Id.* at 15.

Situation 3:

You are trying to negotiate a settlement on behalf of a couple who charge that the bank pulled their loan, ruining their business. Your clients are quite up-beat and deny suffering particularly severe emotional distress. Can you tell your opponent, nonetheless, that they did? Yes or no and please explain.

Yes: Five

No: Eight

Qualified: Two

Situation 4:

In settlement talks over the couple's lender liability case, your opponent's comments make it clear that he thinks plaintiffs have gone out of business, although you didn't say that. In fact, the business is continuing and several important contracts are in the offing. You are on the verge of settlement; can you go ahead and settle without correcting your opponent's misimpression? Yes or no and please explain.

Yes: Nine

No: Four

Qualified: Two¹³⁰

B. *The 2008 Survey*

Given that two decades have passed since Lempert's work was conducted, I thought it would be helpful to send out another survey. I mailed out the same four ethically challenging situations to thirty lawyers throughout the country to see if, twenty years later, there might be greater consensus in the answers given. The survey participants included eight law professors, twenty-one practicing lawyers, and a federal judge.¹³¹ Following is a listing of how the participants responded (together with the results from

¹³⁰ *Id.*

¹³¹ Survey results are on file in my office at the William S. Boyd School of Law. The lawyers filling out the questionnaires are people I met during law school and during my fifteen year career in various law-related jobs (including law clerk, federal government attorney, Hewlett Fellow in conflict resolution, and law professor). These individuals, in turn, sent the questionnaire to attorney colleagues and acquaintances of their own—people I have never met. While the lawyers who responded are engaged in varied practice areas, work in both the public and private sectors, and live in states throughout the country, the survey could hardly be called a valid empirical study, just as the individuals responding to the survey could “hardly be called a sample of anything other than lawyers . . . who were willing to share their observations.” Peters, *Attorney Truthfulness*, *supra* note 35, at 121 n.12; see also Carrie Menkel-Meadow, *Lying to Clients for Economic Gain or Paternalistic Judgment: A Proposal for a Golden Rule of Candor*, 138 U. PA. L. REV. 761, 761 n.4 (1990). Nevertheless, the 1988 survey and the current survey lend support to the notion that haziness and confusion prevailed both twenty years ago and today regarding truthfulness rules and standards in law.

1988). Both raw numbers and percentages are included, for the sake of comparison:

Situation 1:

Your clients, the defendants, have told you that you are authorized to pay \$750,000 to settle the case. In settlement negotiations after your offer of \$650,000, the plaintiffs' attorney asks, "Are you authorized to settle for \$750,000?" Can you say, "No I'm not"? Yes or no and please explain.

<u>1988</u> : Yes: Seven (47%)	No: Six (40%)	Qualified: Two (13%)
<u>2008</u> : Yes: Eight (27%)	No: Eighteen (60%)	Qualified: Four (13%)

Situation 2:

You represent a plaintiff who claims to have suffered a serious knee injury. In settlement negotiations, can you say your client is "disabled" when you know she is out skiing? Yes or no and please explain.

<u>1988</u> : Yes: One (7%)	No: Fourteen (93%)	Qualified: None (0%)
<u>2008</u> : Yes: Six (20%)	No: Twenty (67%)	Qualified: Four (13%)

Situation 3:

You are trying to negotiate a settlement on behalf of a couple who charge that the bank pulled their loan, ruining their business. Your clients are quite up-beat and deny suffering particularly severe emotional distress. Can you tell your opponent, nonetheless, that they did? Yes or no and please explain.

<u>1988</u> : Yes: Five (33.3%)	No: Eight (53.3%)	Qualified: Two (13.4%)
<u>2008</u> : Yes: Seven (23.3%)	No: Twenty-two (73.3%)	Qualified: One (3.4%)

Situation 4:

In settlement talks over the couple's lender liability case, your opponent's comments make it clear that he thinks plaintiffs have gone out of business, although you didn't say that. In fact, the business is continuing and several important contracts are in the offing. You are on the verge of settlement; can you go ahead and settle without correcting your opponent's misimpression? Yes or no and please explain.

<u>1988</u> : Yes: Nine (60%)	No: Four (27%)	Qualified: Two (13%)
<u>2008</u> : Yes: Twenty-two (73.3%)	No: Seven (23.3%)	Qualified: One (3.4%)

C. *The Results*

The results of the most recent survey indicate that strong differences of opinion still exist today, just as they did twenty years ago. In fact, it could be argued that the differences of opinion are even greater today, given that there was not a strong consensus among the participants on any of the questions in 2008. (Twenty years ago, on the other hand, consensus was expressed in "Situation 2," with fourteen people responding "No" and only one person responding "Yes.")¹³² Although a more sophisticated survey, and more sophisticated sampling methods, might have been used both twenty years ago and today, the results nonetheless suggest that confusion regarding truthfulness standards in negotiation was present then, and is still present today—especially given that the ethics situations presented in the surveys were not particularly elaborate or complicated.

VI. WHY RAISING THE ETHICAL BAR FOR LAWYER-NEGOTIATORS WOULD LIKELY FAIL

One way to try to ensure fairness and integrity in the negotiation process is to simply mandate it: Write strict proscriptions against behaviors such as lying, indeed, any kind of lying, into rules of professional conduct for lawyers. In reviewing the negotiation literature in the area of lying and deception, the vast majority of legal academics writing on the subject have advocated strengthening the duty of candor under the rules of professional conduct.¹³³ In some instances, the proposed solution is to strengthen (or even

¹³² One person who responded "Yes" to this question in 2008 states, "I don't think the two are necessarily mutually exclusive." A person who gave a "Qualified" answer to this question in 2008 states, "I assume for this situation that there is some part of the knee injury which is ongoing or renders the person disabled for the purpose that they would typically use it for (i.e., maybe they can ski with accommodations, but cannot run, or sit in a chair which they need to do for work, etc.). However, if the lawyer is claiming total disability, then they could not make this statement." All answers are on file with the author at William S. Boyd School of Law.

¹³³ Of course, several academics and practitioners have argued that the rules of professional conduct regarding truthfulness do not need to be strengthened. They argue that either the status quo is fine or that the current rules are, in fact, already too stringent and should therefore be interpreted with greater leeway or eliminated all together. More specifically, they make the following arguments: (1) because lawyers already find it "extremely difficult" to conform to the limited obligations for truthfulness imposed by current rules, imposing any greater burden would be problematic (*see* Robert P. Burns, *Some Ethical Issues Surrounding Mediation*, 70 *FORDHAM L. REV.* 691, 696–97 (2001)); (2) because of the inability to enforce rules regarding negotiation truthfulness, all current rules should be eliminated and negotiators should simply adhere to the maxim, "caveat

create from whole cloth) one or more rules of professional conduct.¹³⁴ In other instances, the call is far more general, simply imploring negotiators to exhibit honesty or good faith in their work. Scholars wishing to raise the ethical bar for lawyer-negotiators have advocated the following:

(1) Forbid lying and all other forms of deception in a negotiation, and require disclosure of all facts known to be important to the other party;¹³⁵

(2) Promulgate new Model Rules of Professional Conduct for Lawyers in Negotiation ("MRPCN") that provide sanctions for results failing to "at least adequately meet the interests of both sides."¹³⁶ The rules would also omit the word "material" from the current Model Rule 4.1(a), thereby forbidding lawyers from making any false statement of fact or law to a third person;¹³⁷

(3) Lawyers, when negotiating, would owe each other an obligation of "total candor and total cooperation to the extent required to insure that the result is fair";¹³⁸

(4) Lawyers "should not misrepresent or conceal a relevant fact or legal principle to another person," nor should they "intentionally or recklessly deceive another or refuse to answer material and relevant questions in representing clients."¹³⁹ In essence, lawyers should "do no harm" and adhere

lawyer" (see Thomas F. Guernsey, *Truthfulness in Negotiation*, 17 U. RICH. L. REV. 99, 125 (1982)); and (3) the legal regulation of trustworthiness "cannot go much further than to proscribe fraud" (see Hazard, *supra* note 16, at 196); see also Van M. Pounds, *Promoting Truthfulness in Negotiation: A Mindful Approach*, 40 WILLAMETTE L. REV. 181, 197 (2004) (concluding that Professor Hazard was correct in his assessment)).

¹³⁴ See Fairman, *supra* note 18, at 707 ("I confess I have an affinity for rules."); Christopher M. Fairman, *A Proposed Model Rule for Collaborative Law*, 21 OHIO ST. J. ON DISP. RESOL. 73, 75 (2005) ("Rules of ethics serve a vital educational function. Those who are new to the practice of law need guidance on their role and responsibilities. Similarly, lawyers who are new to a particular practice area benefit from clear rule-based guidance. This is particularly true in the field of alternative dispute resolution."); Peters, *Attorney Truthfulness*, *supra* note 35, at 141 ("Creating an objective rule may help lawyers change their behavior because lawyers are generally familiar with rules and comfortable measuring their actions against regulations.").

¹³⁵ Peters, *Use of Lies*, *supra* note 5, at 50 (noting that a large impediment to establishing such a convention is "the fact that it is very difficult for one negotiator to know whether the other has used deception").

¹³⁶ Bordone, *supra* note 5, at 30.

¹³⁷ *Id.*

¹³⁸ Steele, *supra* note 5, at 1403 (noting the rule "is not designed for specific situations," but instead "points toward an ethos of high-toned morality among negotiating lawyers").

¹³⁹ Carrie Menkel-Meadow, *The Limits of Adversarial Ethics*, in *ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION* 123, 136 (Deborah L. Rhode ed., 2000).

to a "golden rule" of treating all parties to a legal matter as they would wish to be treated themselves;¹⁴⁰

(5) Implement a standard of good faith for mediation,¹⁴¹ including open and frank discussions about the case at hand, "not lying when asked a specific and direct question," and "not intentionally misleading the other side";¹⁴²

(6) Amend state versions of Model Rule 4.1 (and its Comments) to prohibit false statements about interests and priorities;¹⁴³

(7) Adopt a rule mandating that lawyers negotiate "honestly and in good faith"¹⁴⁴ and prohibiting "unconscionably unfair" results;¹⁴⁵

¹⁴⁰ *Id.* The idea of incorporating a greater sense of fair play into the Model Rules is not new; a discussion draft of the Model Rules from 1980 would have included a new Model Rule 4.2 requiring that "[i]n conducting negotiations a lawyer shall be fair in dealing with other participants." A. B. A., Comm'n on Evaluation of Prof. Standards, Discussion Draft of the Model Rules of Professional Conduct (1980).

¹⁴¹ Mediation is merely a facilitated negotiation. See Peter Robinson, *Contending With Wolves in Sheep's Clothing: A Cautiously Cooperative Approach to Mediation Advocacy*, 50 BAYLOR L. REV. 963, 964 (1998) ("Mediation is facilitated negotiation. In mediation the parties retain the decision making authority and thus participate as negotiators in the mediation. Existing literature on negotiation advocacy provides helpful insights for a discussion of effective mediation advocacy.").

¹⁴² Kovach, *supra* note 15, at 963.

¹⁴³ Peters, *Attorney Truthfulness*, *supra* note 35, at 139. Such amendments, however, would not limit lying about value estimates and settlement intentions, as currently allowed under Model Rule 4.1. *Id.* at 139. Note that another scholar advocates outright repeal of Model Rule 4.1, stating, "Since no one has apparently made a persuasive argument that lawyer negotiators cannot operate on a high plane, the presumption of honest behavior should remain, and the exception to the requirement of truthfulness for lawyers engaged in negotiations, created by Model Rule 4.1 and its Comment, should be repealed." Thurman, *supra* note 5, at 116. Still another scholar proposes revising Model Rule 4.1 by eliminating the word "material" and eliminating the commentary language attempting to distinguish between "material" facts and other kinds of facts. James J. Alfini, *Settlement Ethics and Lawyering in ADR Proceedings: A Proposal to Revise Rule 4.1*, 19 N. ILL. U. L. REV. 255, 269-70 (1999); see also Carrie Menkel-Meadow, *The Lawyer as Consensus Builder: Ethics for a New Practice*, 70 TENN. L. REV. 63, 95 (2002) (arguing that the misrepresentation permitted by Model Rule 4.1's commentary is problematic because there are "no obligations to volunteer information or to correct misinformation by other parties or lawyers in the proceedings unless the duty is imposed by other law, such as state fraud law or rules of civil procedure").

¹⁴⁴ Rubin, *supra* note 5, at 589-90 (adding "[s]ubstantial rules of law in some areas already exact of principals the duty to perform legal obligations honestly and in good faith. Equivalent standards should pervade the lawyer's professional environment. The distinction between honesty and good faith need not be finely drawn here; all lawyers know that good faith requires conduct beyond simple honesty.").

(8) Attorneys and clients could choose to conduct negotiations under Model Rule 4.1 as it currently stands, or they could decide to invoke the so-called new Rule 4.1(2), mandating negotiating in good faith¹⁴⁶ with an honest¹⁴⁷ and open¹⁴⁸ exchange of information.¹⁴⁹ While this would require disclosure of material information about fact and law,¹⁵⁰ parties would not be required to disclose their “bottom line” or reservation point, the priority of their interests, or their preferences regarding different settlement issues.¹⁵¹

There are, of course, difficult issues surrounding the idea of raising the ethical bar on truthfulness. First, raising the bar might be politically difficult to accomplish, taking years before changes are approved and implemented into the various state versions of the Model Rules.¹⁵² Second, strict rules regarding truthfulness might generate additional legal complaints, actions, and maneuvers concerning whether or not the rules have been broken—something that could potentially be used as a weapon for harassment or delay.¹⁵³ Third, raising the bar might lead to a preference for hiring non-

¹⁴⁵ *Id.* at 591.

¹⁴⁶ Lawyers would agree to negotiate in good faith by, “among other things, abstaining from causing unreasonable delay and from imposing avoidable hardships on another party for the purpose of securing a negotiation advantage.” Peppet, *Bargaining Ethics*, *supra* note 15, at 523.

¹⁴⁷ Lawyers would agree to “be truthful in all respects regarding the matter for which this section has been invoked.” *Id.*

¹⁴⁸ Lawyers would agree to “disclose all material information needed to allow the third person in question to make an informed decision regarding the matter.” *Id.*

¹⁴⁹ Professor Peppet also draws up new Rule 4.1(3), which goes even further, allowing parties to opt into a requirement for general fairness. Under this provision, lawyers and clients agree to “refuse to assist in the negotiation of any settlement or agreement that works substantial injustice upon another party.” *Id.* at 523–24. It appears that Peppet’s new Rule 4.1(3) is even more aspirational than 4.1(2), and the two can be invoked together. *Id.* at 524.

¹⁵⁰ *Id.* at 525.

¹⁵¹ Peppet, *Bargaining Ethics*, *supra* note 15, at 524–25.

¹⁵² See Pounds, *supra* note 133, at 195–96 (discussing how Rule 4.1, with changes in the last decade that have been “few and arguably inadequate,” has “withstood the challenge of some twenty years of scholarly debate and criticism” and will “likely continue to survive further challenge”); see also Fairman, *supra* note 18, at 736 (discussing how, despite years of advocacy, “it was not until 2002 that recognition of the most basic form of ADR — use of a third-party neutral — found its way into the Model Rules.” Professor Fairman suggests the “lesson to be learned” is that “[e]ven the most basic recognition of the reconceptualization of lawyer roles takes a long time.”).

¹⁵³ See MNOOKIN ET AL., *supra* note 15, at 294 (discussing how more stringent ethical rules could become “one more weapon in the adversarial arsenal, with each side threatening to bring ethics violation charges against the other”); see also Peppet,

lawyers to carry out one's negotiations. These individuals, not bound by strict ethics rules, would be free to lie, deceive, and behave more like "amoral gladiators" in executing their clients' deals.¹⁵⁴ Fourth, stricter rules do not necessarily translate into more ethical attorney behavior.¹⁵⁵ Finally, the enforcement of stricter rules could be quite difficult, especially given that negotiations tend to occur in private locations, with no official record of conversations or events.¹⁵⁶

Bargaining Ethics, *supra* note 15, at 536 (discussing strategically motivated disciplinary litigation brought to harass or intimidate opposing lawyers).

¹⁵⁴ See, e.g., Peppet, *Bargaining Ethics*, *supra* note 15, at 510 ("If the bar imposed an aspirational bargaining ethic on all lawyers, some set of clients would stop turning to lawyers as their negotiating agents. That set of clients prefers hard-bargainers, and attorneys would no longer qualify."). Professor Peppet also argues that the "standard conception of the lawyer's role" is that of an "amoral gladiator" and that most lawyers view themselves as "partisan and zealous advocate[s], dedicated to the client's cause, and absolved of responsibility for that cause and its pursuit, so long as the lawyer acts within the bounds of the law." *Id.* at 500; David Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 83, 90 (David Luban ed., 1983) (discussing what Luban calls the "adversary system excuse" used by attorneys to justify serving their clients with "moral ruthlessness"); Julie Macfarlane, *Experiences of Collaborative Law: Preliminary Results from The Collaborative Lawyering Research Project*, 2004 J. DISP. RESOL. 179, 201 (2004) (describing how some lawyers can experience tension, even an "acute sense of role dissonance," when they switch from traditional advocacy approaches of lawyering to consensus-building and problem-solving approaches); Menkel-Meadow, *Ethics, Morality*, *supra* note 7, at 129 (arguing that the "long-standing American belief" that the adversary system is the most effective way to learn the truth or achieve justice is "still unsubstantiated by empirical verification"); Annette J. Scieszinski, *Return of the Problem-Solvers: The Profession Needs to Focus on Helping People, Not Just Fighting Battles*, 81 A.B.A. J. 119, 119 (1995) ("The media, which for better or worse educates the public about the role of the lawyer, paints a gladiator who will end up either the conqueror or the conquered.").

¹⁵⁵ See Kovach, *supra* note 15, at 955 ("Not all change will or can be accomplished by ethics alone . . . rules must be complemented by additional efforts"); Greg K. McCann et al., *The Sound of No Students Clapping: What Zen Can Offer Legal Education*, 29 U.S.F. L. REV. 313, 325 n.53 (1995) ("Learning the code" is not the answer to the perceived lack of ethics in the profession"); Pounds, *supra* note 133, at 196 (discussing the "inherent weakness of the written rule" and opining that "[w]ords have a limited capacity to articulate, much less regulate, ethical conduct."); *but see* Rhode, *supra* note 18, at 730 (arguing that, particularly in contexts where the threat of sanctions is remote, an important role of codified norms is "symbolic and educational; they can sensitize professionals to the full normative dimensions of their choices. A collective affirmation of professional values may have some effect simply by supplying, or removing, one source of a rationalization for dubious conduct.").

¹⁵⁶ MNOOKIN ET AL., *supra* note 15, at 293–94 (discussing how more stringent ethical rules would be "very difficult to enforce" and opining that, "[t]o some extent, the minimal nature of Rule 4.1 codifies not only conventional wisdom but also a system that

Indeed, the enforcement issue presents an especially thorny problem. Many of the proposals take an absolutist approach with respect to truthfulness: No lying, period. But such a standard might be nearly impossible to enforce. The problem is that issues at the core of a negotiation (interests, priorities, value estimates, and claim settlement intentions) reside within the minds of the lawyers and their clients. Moreover, these issues are quite malleable; transforming and evolving as negotiations move forward because of changing relationship dynamics; because new information is revealed or becomes available; or because old information is seen in a new or different light based on changing interactions, circumstances, or events. One scholar's description of mediation precisely captures the internal dynamics of a typical negotiation: "[They] are usually dynamic experiences that continually develop new information which often causes participants to re-evaluate risks and reframe objectives. These re-evaluations and reframes are typically strongly influenced by participants' emerging sense of what is important to themselves and others and what is possible in the negotiation."¹⁵⁷

How, then, might one realistically enforce a rule that bans (or drastically limits) lying in negotiation? Proving a violation would require something close to mind-reading ability, not only to know initial stances on interests, priorities, value estimates, and claim settlement intentions, but also to be able to see the constantly changing positions on these matters as the negotiation winds its way from beginning to end.¹⁵⁸ For these reasons, raising the ethical bar for lawyer-negotiators would likely fail.

is at least somewhat enforceable"); see also Paul Rosenberger, Note, *Laissez-“Fair”*: An Argument for the Status Quo Ethical Constraints on Lawyers as Negotiators, 13 OHIO ST. J. ON DISP. RESOL. 611, 627 (1998) (discussing difficulties involved in monitoring for enforcement, which would make negotiations “more like a ‘tribunal’ and remove many of the benefits that have made it such an attractive informal dispute resolution mechanism.”). Rosenberger argues that deceptive behavior is “indigenous to most legal negotiations and could not realistically be prevented because of the nonpublic nature of most bargaining interactions.” *Id.* at 626–27 (noting that in a negotiated settlement, there is no trial and no public testimony by conflicting witnesses, and thus no opportunity to examine the truthfulness of the assertions made during the negotiation. In such a situation, Rosenberger believes that “the honest lawyer may be forfeiting a significant advantage for his client to others who do not follow the rules”).

¹⁵⁷ Peters, *Attorney Truthfulness*, *supra* note 35, at 140 (citations omitted).

¹⁵⁸ On the other hand, even if it is difficult (or nearly impossible) to enforce, the proposed rule might influence lawyers' beliefs and conduct. See Gary Tobias Lowenthal, *The Bar's Failure to Require Truthful Bargaining by Lawyers*, 2 GEO. J. LEGAL ETHICS 411, 444 (1988) (discussing how rigorous ethics rules, when included in law school curricula and bar examinations, “may influence professional socialization, even without

VII. A POSSIBLE SOLUTION: DEFENSIVE SELF-HELP MINDSETS, STRATEGIES, AND TECHNIQUES

I have argued that: (1) for various reasons, people sometimes lie and deceive during negotiation; (2) there appears to be widespread disagreement and confusion regarding truthfulness rules and standards for lawyers; and (3) even when rules and standards are clearer, enforcement is quite difficult because most negotiations take place in private settings rather than in open court. I have also argued that, although numerous academics have recommended doing so in past law review articles, simply raising the ethical bar for attorney-negotiators would likely not be an effective solution to the problem. So what to do? One possible solution is to simply assume that lying and deception sometimes occur, and therefore arm all negotiation participants (lawyers and non-lawyers alike) with mindsets, strategies and techniques that will enable them to defend themselves against the liars and deceivers.

This final part of this article, then, offers prescriptive advice for minimizing one's risk of being exploited in a negotiation should other parties lie. The following suggestions are undergirded by the notion, expressed throughout this article, that information exchange (or lack thereof) plays a pivotal role in all negotiations.¹⁵⁹ Indeed, information is the lifeblood of any negotiation,¹⁶⁰ and therefore, the mindsets, strategies, and techniques that influence if, when, and how information is obtained and/or exchanged (and that influence how complete and accurate that information will be) are

significant changes in enforcement" and how "reinforcing a person's sense of social responsibility might be effective in influencing conduct").

¹⁵⁹ See generally Steven Shavell, *Acquisition and Disclosure of Information Prior to Sale*, 25 RAND J. ECON. 20 (1994) (analyzing the incentives of acquiring information about the value of things prior to negotiations).

¹⁶⁰ See Adler & Silverstein, *supra* note 56, at 67–70 (discussing the importance of information exchange for value creation and positive negotiation outcomes); but see Jean R. Sternlight & Jennifer Robbennolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 OHIO ST. J. ON DISP. RESOL. 437, 526–27 (2008) (discussing studies showing that sometimes attorneys have a "tendency to seek out even irrelevant information." Professors Sternlight and Robbennolt therefore suggest that "as the attorney feels the need to seek out information she should at least ask herself: 'Is this information really important? If I found out X, what would I do? And if I found out not-X, what would I do?' Perhaps the attorney, having had this internal conversation, will realize that the information she thinks she needs is not important after all.").

extremely important in the process of defending one's self (or one's client) against lying and deception.

A. Conduct Thorough Background Research

Conducting a search on various Internet search engines (such as Yahoo! or Google) can often yield large amounts of information about other parties to the negotiation. Websites established by private companies, government entities, and various nonprofit groups are available for criminal, financial, and other background checks.¹⁶¹ If possible, speaking with groups or individuals who have previously worked with or negotiated with one's potential negotiation counterparts can be very illuminating.¹⁶² It can be surprising how much of a "reputation" people develop,¹⁶³ sometimes favorable and sometimes unfavorable, based on previous negotiation behavior.

Consider the earlier example of the art gallery owner from Part III.B who negotiated the purchase of a painting from a starving art student for \$2,750 and who could quickly turn around and re-sell the painting to another client for \$500,000.¹⁶⁴ Keep in mind that the art student asked specifically, before the deal closed, if the gallery owner had already located a buyer for the painting, but the owner effectively evaded the question and the student agreed to the deal. Pretend that the art student found out a short time later that the gallery owner did in fact have a buyer at the ready, and one who was willing to pay half a million dollars for that specific painting. Once the art student begins talking to his artist friends (or perhaps holds a press conference) about what transpired, the gallery owner's reputation (among artists, art collectors, and even those outside the arts community) would be negatively impacted, perhaps even drastically so.

¹⁶¹ One can also simply ask other negotiation parties directly for credentials, credit records, and references.

¹⁶² See HERB COHEN, *YOU CAN NEGOTIATE ANYTHING: HOW TO GET WHAT YOU WANT* 103 (1980) (urging negotiators to gather information "[f]rom anyone who works with or for the person you will meet with during the event or anyone who has dealt with them in the past. This includes secretaries, clerks, engineers, janitors, spouses, technicians, or past customers.").

¹⁶³ See *supra* note 20.

¹⁶⁴ See *supra* Part III.B.

B. *Network for Potential Negotiation Counterparts*

There are times when one has no control over who will sit on the other side of the negotiation table. However, in those instances when one can play a role in selecting negotiation counterparts, one should attempt to do so through referrals, recommendations, or outside introductions. This is a compliment to the party being approached, which can generate feelings of goodwill and help solidify new working relationships should the negotiation process move forward. Initial meetings through referrals and introductions also signal that there is a greater prospect for the development of long-term relationships. Research suggests that, in general, even the prospect of a long-term relationship raises people's ethical standards and reduces exploitative conduct such as lying.¹⁶⁵ Using the art gallery scenario again as an example, what if the student had sought a referral to that same gallery from someone else in the community? In other words, what if the art student entered the gallery and said, "My name is Art Student, and I come to you at the recommendation of Walter Warbucks, who has bought many of his best paintings here." Quite likely, the art gallery owner's negotiation behavior would have been different under such circumstances. Indeed, the person who referred the art student would have an impact similar to that of a chaperone at the high school prom, even if that person were not present during the negotiations.

C. *Create Rapport*

A cordial and supportive environment (one infused with sincerity, understanding, impartiality, empathy, and expressions of genuine concern for the other party¹⁶⁶) will probably not magically prevent lies or encourage people to disclose their deceitful behavior. However, research suggests that such an environment can lead to these individuals relaxing their defenses and providing information that may be used to secure the truth in the future.¹⁶⁷

¹⁶⁵ G. RICHARD SHELL, *BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE* 226 (1999).

¹⁶⁶ See Sternlight & Robbenolt, *supra* note 160, at 503 (discussing behaviors that contribute to building and maintaining a sense of rapport during conversation, including facing the other party directly, leaning forward, keeping arms open instead of crossed, smiling, nodding, and sharing personal or shared interests to develop connection).

¹⁶⁷ KRIEGER & NEUMANN, JR., *supra* note 74, at 81; see also Sternlight & Robbenolt, *supra* note 160, at 503 ("[P]sychological research has found that rapport can result in increased trust and more cooperative interactions. More generally, people tend to remember and disclose greater amounts of information when they feel comfortable and at ease."); Linda Tickle-Degnen & Robert Rosenthal, *The Nature of Rapport and Its*

Specific tactics can be employed within the more relaxed atmosphere that encourage the responder to share increased amounts of information. This includes using exclamations of encouragement such as "Yes?" or "I hear you," or "Go on." This can be coupled with requests for immediate elaboration on certain topics: "Could you tell me more about that?" or "Can you flesh that out a bit?"¹⁶⁸ Research shows that people are more inclined to lie by omission (not revealing the whole truth) than by commission (falsely answering a question when asked),¹⁶⁹ so when they are asked to elaborate and thereby make direct statements that are lies, some people cannot do it and will back away from earlier statements. Finally, one can neutralize the harshness of asking a negative question by implying the question is a playful one. For example, "May I play the devil's advocate for a moment?" is one way to blunt the harshness of a request for information.¹⁷⁰

In one of the examples from Part III.B the seller of a house lies about a competing bid ("Someone has just offered me \$110,000!"), thereby persuading the potential buyer that the seller's bottom line is \$20,000 higher than is his actual bottom line.¹⁷¹ By lying, the seller reaps a substantial monetary benefit in the negotiation. But would the seller have lied if more rapport had been created during the negotiation?¹⁷² Moreover, might the seller have backed away from the lie ("They just withdrew their \$110,000 offer!") if the buyer had requested immediate elaboration regarding the bid ("Can you tell me more about the party?" or "How did that bid come through?" or "Can I speak with their realtor?").

Nonverbal Correlates, 1 PSYCHOL. INQUIRY 285, 287 (1990) (stating that parties that are familiar with each other are "at ease in expressing dissent one minute and assent the next.").

¹⁶⁸ See Stephen Moston & Geoffrey M. Stephenson, *The Changing Face of Police Interrogation*, 3 J. COMMUNITY & APPLIED SOC. PSYCHOL. 101-15 (1993).

¹⁶⁹ Maurice E. Schweitzer & Rachel Croson, *Curtailling Deception: The Impact of Direct Questions on Lies and Omissions*, in WHAT'S FAIR: ETHICS FOR NEGOTIATORS, *supra* note 15, at 175-99 (discussing studies where far more subjects were willing to lie by omission than by commission).

¹⁷⁰ JOHN BRADY, *THE CRAFT OF INTERVIEWING* 89-107 (1977).

¹⁷¹ See *infra* Part III.B.

¹⁷² In this particular context, building rapport may have involved the buyer attempting to engage the seller in conversation about family and neighborhood ("Where are you moving to?", "What activities did you enjoy while you lived in this neighborhood?", "Can you tell me about some of the neighbors I would meet if I lived here?", or "How old are your kids?").

D. Demand the Use of Objective Standards—But Avoid Being Hamstrung by Them

Asking questions such as, “What do you base that number on?” or “Is that according to industry standard?” is essentially asking the other party to justify their position using objective standards. People will be less likely to attempt to lie and deceive if they know from the start of the negotiation that objective criteria and standards will constantly be sought from other parties, as well as outside sources.¹⁷³ The earlier art gallery example can shed additional light on the use of objective criteria.¹⁷⁴ The gallery owner justifies his \$2,750 offer for the painting through an astute use of objective standards: he references the *Official Art Auctions Book of the World* (the comprehensive book on art that is similar to the Kelley Blue Book on cars) which tells him the auction price of twelve different paintings (of various sizes and conditions) by the same artist, all sold in the last two years. The owner’s offer to the art student falls within the range of the auction prices listed (all of which were between \$2,000 and \$3,000).

The lesson to be learned is that using objective criteria alone cannot always prevent one from making a deal that is inferior to one that could be made. In this scenario, objective criteria might provide an adequate floor for the price of a painting, but one must ask (or discover through investigation) if there are other factors that can raise the price above that floor. In other words, what might be going on in this particular situation that would make someone willing to pay more than the objective standard? Or, is there someone who has a personal (or some other) connection to the painting that makes it more valuable to him or her than the market would be willing to pay? Or, is there something about this particular painting that somehow differentiates it from the twelve that already sold on the market? In other words, one must not be hamstrung by the power and credibility provided by objective standards.

E. Strategically Limit Information Revelation

Before the negotiation, one should brainstorm and list specific questions that will likely be asked by the other party. With enough preparation, many (if not most) questions can be anticipated. One might practice aloud how specific questions will be responded to and addressed, especially difficult and

¹⁷³ Gary Goodpaster, *A Primer on Competitive Bargaining*, 1996 J. DISP. RESOL. 325, 373 (1996) (stating that “[a] negotiator should make a practice of asking the other party to justify its positions in terms of some objective criteria.”).

¹⁷⁴ See *infra* Part III.B.

controversial questions. Practicing aloud can make it easier to arrive at word and phrase choices that will prevent or limit the revelation of strategic information. Preparation should also include deciding upon which tactic to employ in responding to questions about information that one does not wish to disclose. For example, should one decide to ignore the question all together? Or pretend to misconstrue the question and answer a less intrusive, specific, or direct question? Or perhaps respond not with an answer at all, but instead with a question of one's own?¹⁷⁵ In the art gallery example, the gallery owner may have anticipated that he might be asked if there was already a buyer in place for the painting he was acquiring from the art student. The gallery owner's answer ("We purchase paintings from people like you every single day and try to re-sell them as quickly as we possibly can") was quite successful at evading the question¹⁷⁶ and thereby not revealing the key piece of information that a wealthy buyer was waiting in the wings to purchase the painting as soon as it could be located.

F. Recognize and Thwart Tactics of Evasion

The simplest way to get information is to ask for it,¹⁷⁷ yet it is sometimes the most obvious (and crucial) questions that do not get asked (or answered) during a negotiation. Prior to negotiating, one should write out a list of all the questions he or she wants answered, in order of importance. During the negotiation, one should listen carefully to the responses provided; many will be mere attempts to evade answering the question. Evasion techniques are abundant and varied (ignoring the question; offering to return to the question later; answering only part of the question; answering a related but less intrusive, specific, or direct question; calling the question unfair or inappropriate and therefore not entitled to a response, etc.).¹⁷⁸ These or similar evasion techniques will likely be employed throughout the negotiation, and the most effective antidote is careful listening to determine

¹⁷⁵ See CRAVER, *supra* note 15, at 95–98.

¹⁷⁶ See *infra* Part III.B.

¹⁷⁷ See LINDA BABCOCK & SARA LASCHEVER, WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE ix (2003) ("Women don't ask. They don't ask for raises and promotions and better job opportunities. They don't ask for recognition for the good work they do. They don't ask for more help at home . . . women are much less likely than men to use negotiation to get what they want.").

¹⁷⁸ See CRAVER, *supra* note 15, at 95–98; see also Robert S. Adler, *Negotiating With Liars*, 48 SLOAN MGMT. REV. 69, 71 (2007) ("As viewers who watch politicians and public officials on Sunday morning interview shows can attest, there is a real art to responding to questions by changing the subject or answering questions that have not been asked.").

if one's question is being addressed in full, in part, or not at all. One must continue grilling until the information being sought is either revealed or protected in a very direct manner. Thus, one might continue asking the same question (along with reasonable follow-up questions to probe even deeper) until the question (1) can be "checked off" as having been responded to in a (reasonably) complete and forthcoming manner, or (2) is met by the other party saying something to the effect of, "I simply cannot tell you that," or "I cannot speak about that issue at all."¹⁷⁹

G. Establish Long-Term Relationships and Watch for Signs of Deception

If one were skilled at detecting liars upon meeting them, one could simply walk away from the negotiation. Unfortunately, research indicates that people are very poor at such immediate detection. This is true even among the so-called "experts" (such as police investigators) who are more confident, but not more accurate, in their determinations of who is lying and who is not.¹⁸⁰ However, research suggests that if one can build a relationship with a person over a longer period of time, then one has a much greater ability to detect lies. Specifically, the research indicates that one of the more reliable indicators of lying is when one's behavior suddenly changes: three scholars conducting an extensive study of deceptive behavior suggest that establishing a baseline in behavior before attempting to detect deception is extremely important.¹⁸¹ They conclude that "The most reliable indicator of deception is likely to be a change from normal behavior within a particular

¹⁷⁹ It is difficult, if not impossible, for one to know whether a question has been answered in a complete and forthcoming manner. Answers given to follow-up questions are key in helping to make such an assessment. It is important to remind oneself that negotiation is a science, but also an art. *See generally* RAIFFA, *supra* note 32.

¹⁸⁰ *See* Sternlight & Robbennolt, *supra* note 160, at 486–87 (discussing how people widely believe that certain cues like averting one's gaze, engaging in lots of foot or hand movements, or hesitating while speaking that are indicators of deception even though evidence strongly suggests that (1) there is no particular cue (or set of cues) that can reliably be used to identify a liar, and (2) people's performance levels in distinguishing liars from truth-tellers are "little or no better than chance"); Saul M. Kassin, *Human Judges of Truth, Deception, and Credibility: Confident But Erroneous*, 23 CARDOZO L. REV. 809, 810 (2002); Saul M. Kassin et al., "I'd Know a False Confession if I Saw One": A Comparative Study of College Students and Police Investigators, 29 LAW & HUM. BEHAV. 211, 213 (2005).

¹⁸¹ Samantha Mann et al., *Suspects, Lies, and Videotape: An Analysis of Authentic High-Stake Liars*, 26 LAW & HUM. BEHAV. 365, 372–76 (2002).

individual.”¹⁸² For example, if a normally aggressive and boisterous negotiator suddenly becomes more passive and soft spoken, it might be a clue that he or she is engaging in deceptive behavior. This conclusion underscores the importance of developing long-term relationships with potential negotiation partners, where baseline behaviors can be established, where changes in those normal behaviors can be observed, and where possible deception can thereby be detected.¹⁸³

H. Use “Come Clean” Questions Strategically

Used at critical moments in the negotiation (often toward the conclusion of covering an important topic within the context of a larger negotiation), one can ask the “come clean” question: “Is there something important known to you, but not to me, that needs to be revealed at this point?”¹⁸⁴ Negotiators on the other side of the table might attempt to deflect the question or change the topic, so one should be prepared to ask the question more than once (perhaps with a new approach and different wording). One should pay close attention to the response given to the question, perhaps even writing it down.¹⁸⁵ After all, the response might later be used to support a claim of fraudulent non-disclosure if it is learned that valuable information was intentionally withheld. Finally, one should be careful to observe body language when asking the “come clean” question, as body language sometimes speaks louder than words.¹⁸⁶

¹⁸² *Id.* at 372.

¹⁸³ Many practicing attorneys will find that many, if not most, of their negotiations will take place by phone. Detecting deception will likely be more difficult over the phone because one cannot see changes in the other person’s body language. *See generally* ALBERT MEHRABIAN, *SILENT MESSAGES* (1971).

¹⁸⁴ Adler & Silverstein, *supra* note 56, at 70.

¹⁸⁵ One must be mindful, however, that note taking during a negotiation can sometimes be interpreted by other parties as a sign of litigation preparation. Such an interpretation can sometimes be avoided by a brief, disarming comment such as, “I hope you don’t mind that I take notes—it’s just a habit I have to help me focus on the conversation as we move along toward a deal.”

¹⁸⁶ *See* MEHRABIAN, *supra* note 183 (groundbreaking work conducted by Professor Albert Mehrabian demonstrated that 55% of one’s communicated message is conveyed through posture, gestures, and facial expressions; 36% is through one’s tone of voice; and only 7% is through the words themselves); John W. Kennish, *How to Read Body Language: Non-Verbal Cues Can Turn Into Clues That Help Lead You to the Truth*, 17 PA. LAW. 28 (1995); Laurie Shanks, *Whose Story Is It, Anyway? Guiding Students To Client-Centered Interviewing Through Storytelling*, 14 CLINICAL L. REV. 509, 525 (2008) (discussing the role body language, including “mannerism, gesture, [and] tone,” can play in conveying information); *see generally* PAUL EKMAN, *EMOTIONS REVEALED*:

VIII. CONCLUSION

People lie in negotiations because doing so can sometimes help one close a deal with terms that are highly favorable to one or one's client. In every negotiation, no matter how much value-creation occurs to increase the size of the negotiation "pie," there comes a point when that pie needs to be divided. Simply put, lying can help one secure a larger share of the pie.

Moreover, information is the lifeblood of any negotiation, and at its core, negotiation is about protecting sensitive information of one's own (to prevent oneself from being exploited) while extracting information from other parties. Good negotiators must therefore learn how to conduct extensive background research, to engage aggressively and relentlessly in asking questions and digging for answers, and to take other proactive steps to unearth or extract the most (and most accurate) information possible from all parties at the table. At the same time, they must be mindful of the information they are disclosing and how other negotiation parties might use that information in an exploitive manner.

A clear tension, then, develops between growing the largest possible pie (which is done through sharing information, brainstorming ways to meet all parties' underlying needs, and making trades) and trying to win the largest share possible when the pie is finally divided (an outcome that can sometimes be assisted through bluffing, puffing, and lying). In attempting to manage this ever-present tension, the goal of negotiation becomes creating an environment, designing a process, and implementing behaviors that allow value creation to occur where possible, while simultaneously being aware of (and thereby minimizing) risks of exploitation.

The rules and ethics requirements surrounding truthfulness in negotiation (such as Model Rule 4.1, the duty of disclosure, and, to the limited extent they exist in negotiation, good faith requirements) are far from crystal clear and appear to yield different interpretations and results depending on the circumstances of the negotiation and the person doing the interpreting. Two separate surveys (one from twenty years ago and one quite recent) suggest continuing disagreement and confusion among attorneys attempting to apply the various lawyer ethics rules to various negotiation scenarios. Moreover, even in the more straightforward cases, enforcement issues can present large hurdles because most negotiations take place in private settings rather than in open court.

In the past, many scholars have suggested that the optimal solution to ensure fairness and integrity in negotiation is to raise the ethical bar—to strengthen the duty of candor as currently set forth in rules of professional conduct for lawyers. However, given a continuum of possible reform approaches, I suggest that the more absolutist the approach taken (the closer the reformed rules come to mandating “No lying about anything, period”), the more impossible it becomes to enforce those new rules. This is because the issues at the core of any negotiation (interests, priorities, value estimates, and claim settlement intentions) reside within the minds of the negotiators and their clients. Since these core issues are quite malleable and continuously change and evolve as the negotiation winds its way from beginning to end, proving a violation would require something close to mind-reading ability. For this reason, I argue that raising the ethical bar for lawyer-negotiators would likely fail.¹⁸⁷

Rather than focus on rules, my solution is to assume that lying might occur in a given negotiation, and to provide people with the defensive mindsets, strategies and techniques that will allow them to minimize the risk of their being exploited. People so informed will be able to better understand, interact with, and protect themselves from others who would try to gain unfair advantage through lies and deception. Although it might be impossible to prevent lying in the context of negotiation,¹⁸⁸ it is my hope that the prescriptive advice set forth in this article will prove useful in warding off exploitation of both oneself and one’s clients.

¹⁸⁷ Not to mention the fact that, in those instances where people hire someone to negotiate on their behalf, raising the bar might lead to a preference for hiring non-lawyer negotiators who are not bound by strict and potentially cumbersome ethics rules.

¹⁸⁸ See Arthur Allen Leff, *Unspeakeable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1249 (1979):

All I can say is this: it looks as if we are all we have. Given what we know about ourselves, and each other, this is an extraordinarily unappetizing prospect; looking around the world, it appears that if all men are brothers, the ruling model is Cain and Abel. Neither reason, nor love, nor even terror, seems to have worked to make us ‘good,’ and worse than that, there is no reason why anything should.